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IN THE

Supreme Court of the United States

October Term, 1966

ROBERT H. MARTIN, *Petitioner*

v.

PHILLIPS PETROLEUM COMPANY, CHEMICAL BANK, NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., GAS INDUSTRIES MANAGEMENT CORPORATION and GASOLINE PLANT CONSTRUCTION CORPORATION, *Respondents*

NO._____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. The Court of Appeals erroneously assumed controverted facts and then, based on such assumed facts, decided the threshold question as a matter of law that Martin had no business or property which could be the subject of injury under Section 4 of the Clayton Act (15 U.S.C. Section 15). On that holding the Court of Appeals affirmed the District Court without discussing the remaining issues. (See Appendix C.)	20

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A. The Court erroneously assumed that Martin's option from Jett was so "burdened with infirmities" (Appendix A, p. 10) and that his relationship with Bank was so tenuous that Martin had no "property" within the meaning of the Clayton Act (15 U.S.C. Section 15). 20

B. The Court further erroneously assumed that Martin was unprepared to "either enter the new business (of gas processing) or to expand his existing business to include the gasoline plant purchase and operation" (Appendix A, pp. 9-10) and thus had no "business" within the meaning of Section 4 of the Clayton Act (15 U.S.C., Section 15). 20

1. The Court of Appeals was in error because Martin's right to exercise his option was not conditioned on expansion of plant capacity. 21

2. The Court of Appeals was in error because the reserves were adequate for Martin's financing by Bank. ... 22

3. The Court of Appeals was in error because Bank's financing Martin was not conditioned (i) on a reserve report by DeLaat supporting a throughput of 40,000 mcfd, or (ii) on Jett's agreement to subordinate his interest. 23

4. The Court of Appeals was in error because Bank had no right to give Martin's deal to Phillips. 25

5. The Court of Appeals was in error because Martin was able to operate the plant. 25

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6. The Court of Appeals was in error because Martin had the ability to finance the acquisition. 25

7. The Court of Appeals was in error because if Martin was a "mere finder" he nonetheless had "business or property". 26

8. The Court of Appeals was in error because Martin's recognized option was valid. 27

II. This Court has never written on the meaning of the phrase "business or property" contained in Section 4 of the Clayton Act (15 U.S.C., Section 15) and such action is important to the private administration of the antitrust laws. 28

III. The decision in this case of the Court of Appeals for the Fifth Circuit on "business or property" is in conflict with decisions of other courts of appeals. 29

IV. The holding of the Court of Appeals erroneously affirming the summary judgment of the District Court which held that the actions of the respondents were not violations of the antitrust laws and in failing to hold that such actions did, as a matter of law, constitute such violations, is in conflict with the decisions of this Court and other Courts of Appeals. 32

A. The holding is in conflict with decisions holding such actions constitute unlawful exclusion of a competitor from substantial participation in a market in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1). 32

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B. The holding is in conflict with decisions holding such actions constitute a boycott in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1). 34

C. The holding is in conflict with decisions holding actions such as those of Bank in tying to the availability of its credit in Martin's behalf that he accept Phillips as dominant interest owner-operator of the plant and marketer of its products constitute unlawful tying arrangements in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1). 36

D. The decision is in conflict with decisions holding that predatory combinations and conspiracies such as that between Bank and Phillips, the leading producer nationally of LPG products and a substantial seller in an oligopolistic relevant market, constitute attempts or conspiracies to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C., Section 2). 37

E. The decision is in conflict with other decisions holding that actions such as that of Phillips, a substantial existing competitor in the already oligopolistic Locust Ridge relevant market, in acquiring the assets of the competitive Locust Ridge corporations, constitute a violation of Section 7 of the Clayton Act (15 U.S.C., Section 18). 39

V. The denial of discovery as affirmed by the Court of Appeals is contrary to the decisions of this Court and other Courts. 40

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IN THE

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October Term, 1966

ROBERT H. MARTIN, *Petitioner*

v.

PHILLIPS PETROLEUM COMPANY, CHEMICAL BANK, NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., GAS INDUSTRIES MANAGEMENT CORPORATION and GASOLINE PLANT CONSTRUCTION CORPORATION, *Respondents*

NO._____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner ROBERT H. MARTIN (Martin), prays that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to review the judgment entered in the above case on July 26, 1966, affirming the summary judgment of the United States District Court for the Southern District of Texas. (Appendix A, p. 12)

OPINIONS BELOW

The United States District Court for the Southern District of Texas, Houston Division, rendered an unreported memorandum decision on the 25th day of January, 1965 (Appendix B) granting respondents'[1] Motions for Summary Judgment and denying Martin's Motion for Summary Judgment on the issue of liability. The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A) affirming the District Court is reported at _____ F.2d_____.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered July 26, 1966. The jurisdiction of this court is invoked under 28 U.S.C. Sections 1254(1) and 1651. Jurisdiction in the district court was based on federal questions arising under Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C., Sections 1 and 2), and Sections 4 and 7 of the Clayton Act (15 U.S.C., Sections 15 and 18).

QUESTIONS PRESENTED

1. Whether it was proper for the Court of Appeals in affirming the summary judgment of the district court to assume controverted facts and hold as a matter of law that petitioner Martin had neither "business or property"

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[1] An abbreviated reference will hereafter designate respondents, namely, Phillips Petroleum Company as Phillips; Chemical Bank New York Trust Company as Bank; Texas San Juan Oil Corporation as Texas San Juan; Bart DeLaat and Bart DeLaat and Associates, Inc., as DeLaat; Gasoline Plant Construction Corporation as Gasoline Plant, Tensas Gas Gathering Corporation as Tensas and Gas Industries Management Corporation as Gas Industries.

within the meaning of Section 4 of the Clayton Act. (15 U.S.C. Section 15).

2. Whether the Court of Appeals erred in failing to hold as a matter of law that Martin, an independent oil and gas operator, with an option to purchase a gasoline plant and related facilities and expand his oil and gas operations, which acquisitions and expansions were in the final stages of financing by Bank, had such "business or property" as entitled Martin to maintain an action for damages resulting from a predatory combination and conspiracy between Bank and other respondents, whereby respondents appropriated the properties covered by the option and prevented Martin from expanding his business.

3. Whether the Court of Appeals erred in affirming the holdings of the district court that the actions of Bank, Phillips and other respondents in secretly undermining Martin's negotiations, assuming an authoritative role with respect to his proposition and by Bank tying the services of Phillips as operator and marketer to the extension or availability of its credit in Martin's behalf, did not constitute a violation of Section 1 of the Sherman Act, (15 U.S.C., Section 1), as either: (1) an unlawful combination foreclosing Martin from the marketing of substantial LPG and other products in commerce; or (2) a boycott; or (3) a tying arrangement in violation of such section and in affirming the district court's failure to hold that such actions by respondents did, as a matter of law, constitute such violations.

4. Whether the Court of Appeals erred in affirming the holding of the district court that the actions of Phillips as the leading producer nationally of liquid petroleum gas (LPG) products, and as a substantial seller in the oligopolistic Locust Ridge relevant market, particularly in view

of the predatory nature of its conduct in combination with Bank and other respondents, did not constitute an attempt to monopolize or a conspiracy to monopolize the marketing of any part of LPG products and in affirming the district court's failure to hold that such conduct of Phillips did, as a matter of law, constitute such violation.

5. Whether the Court of Appeals erred in affirming the holding of the district court that the acquisition by Phillips, the largest producer of LPG products in the United States and a substantial existing competitor in the relevant market, of the assets owned and operated by Tensas and Gas Industries including the right to market the LPG products from the Locust Ridge plant, did not constitute a violation of Section 7 of the Clayton Act, (15 U.S.C. Section 18), and in affirming the district court's failure to hold that such acquisition of assets by Phillips did, as a matter of law, constitute such violation.

6. Whether there exists genuine issues of material fact with respect to any controlling combination of questions 1 through 5?

7. Whether it was appropriate for the Court of Appeals to affirm the summary judgment of the trial court dismissing Martin's complaint when the trial court had denied Martin effective discovery of critical documents and crucial economic data in Bank's and Phillip's control.

FEDERAL STATUTES INVOLVED

28 U.S.C. Section 1254(1), a jurisdictional section, reads in relevant part:

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . ."

28 U.S.C. Section 1651, another jurisdictional section, reads in relevant part:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Martin charged respondents with violating Sections 1 and 2 of the Sherman Act, (15 U.S.C. Sections 1 and 2). For these violations Martin sought to recover treble damages under Section 4 of the Clayton Act, (15 U.S.C. Section 15).

Section 1 of the Sherman Act, (15 U.S.C. Section 1), in relevant part, reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . ."

Section 2 of the Sherman Act, (15 U.S.C. Section 2), in relevant part, reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

Section 4 of the Clayton Act, (15 U.S.C. Section 15), in relevant part, reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of

> the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy . . ."

Martin also charged Phillips, in combination with Bank and other respondents, with the acquisitions of assets of Locust Ridge corporations under conditions that constituted a violation of Section 7 of the Clayton Act. (15 U.S.C. Section 18). Section 7 is relevant to Question No. 5 and reads in relevant part as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

STATEMENT OF THE CASE

A. *Procedural Background*

This is an antitrust treble damage action brought by Martin against respondents, trial by jury having been de-

manded at the time of filing the original complaint. (R. 17-39, 557-580) After most of the depositions had been completed, but with Martin's being denied certain crucial documents and other information, respondents moved for summary judgment. (R. 581, 682, 684, 687, 690, 872) Martin answered denying respondents' right to summary judgment, alleging the total undisputed facts entitled him to judgment on the issue of liability, but, in any event, asserting the existence of numerous specific material fact issues, and finally that discovery had not been completed and summary judgment was premature. (R. 697-713, 856-870) Subject to such answer, Martin made a cross-motion for summary judgment on the issue of liability only. (R. 693-696) The district court, in a memorandum decision dated January 25, 1965, granted respondents' motions for summary judgment and denied Martin all relief. (Appendix B)

Martin then appealed to the Court of Appeals for the Fifth Circuit urging the points set forth in Appendix C. The Court of Appeals reached only a threshold question, concluding that Martin had neither business nor property injured by the alleged combination and conspiracy of respondents and refused to discuss or decide the other issues presented. (Appendix A) There was thus left outstanding the wholly unsatisfactory and inadequate discussion and holdings of the trial court on the issues involved. (Appendix B)

B. *Martin-Jett and Martin-Bank Relationships*

About 1959, the Locust Ridge gasoline plant situated in the vicinity of various gas fields in eastern Louisiana began operation. The plant processed raw natural gas produced in western Mississippi and eastern Louisiana, its products being natural gasoline, liquid petroleum gases (LPG's) and dry

or residue gas, which products are of substantial value and move in interstate commerce.[2] (R. 560, 562, 570, 574-575, 629, 630, 640, 648, 651, 652, 657, 660, 661, 760-761, 950; Appendix B, pp. 1-2)

The owners desired to sell the plant and its appurtenant facilities and assets. Jett, an independent oil and gas operator of Shreveport with substantial shut-in gas wells and 30,000 acres of undeveloped leases in the plant area, took an option to purchase the properties with the hope of expanding the plant to provide a market for his shut-in gas. (R. 560-561, 629-630, 647-648, 657, 757-758, 874-876, 895-907, 1514)

Martin became interested and in November, 1960, Jett made a firm proposal to Martin. Late in November while in Bank's New York offices on other matters, Martin advised H. C. Bailey, a vice-president of Bank, that Martin had an opportunity to acquire a gas processing plant. (R. 144, 876, 950, 998-1000, 1159-1160; Martin Dep. Ex. DM-46; Appendix B, p. 2)

Bailey's interest was immediate and intense because Bank controlled Texas San Juan, a corporation hopelessly in debt to Bank, which had a large tax loss incurred in oil and gas offshore drilling operations. Bailey had been instructed to

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[2] There is no question that interstate commerce is involved nor that such commerce is substantial. Phillips projected income from the properties for the last quarter of 1961 at $810,000.00, made up of sales of $73,000.00 from 12# gasoline, $128,000.00 of LPG's, $43,000.00 of distillate, and residue gas sales to Olin Transmission Corporation of $244,000.00 and American Louisiana Pipeline Company of $262,000.00, and for 1962 the corresponding sources would yield $510,000.00 from LPG's, $293,000.00 from 12# gasoline, $172,000.00 from distillate, gas sales of $975,000.00 to Olin, $1,057,000.00 to American Louisiana and miscellaneous income of $239,00.00, for a total of $3,247,000.00. (R. 1628, 1510-1515; McCullough Dep. Ex. P Mc-40)

look for just such a gas processing plant against whose income Texas San Juan could utilize its tax loss. (R. 950-951, 1000-1011, 1102-1110, 1160, 1162, 1456; Appendix B, p. 2)

Bailey pressed Martin to submit more information which Martin did while at the same time intensifying his negotiations with Jett for a sub-option. By mid-December Bailey and Bank's geologist, Dr. Anderson, traveled to Houston to meet with Martin and concluded the basic terms. (R. 950-951, 980-983, 1014-1020, 1160-1162; Appendix B, pp. 2-3)

It was at this time agreed between Martin and Bailey: (1) that Martin would operate the plant and market its products; (2) that Martin would give up a half interest in the properties in exchange for total financing by Bank; (3) that title to the properties would be taken in Texas San Juan to utilize its tax loss; and (4) after payout of the loans the residual interest would be owned equally between Martin and Bank subject to Jett's interest. (R. 951, 1018-1020, 1169-1172, 1396, 1502; Appendix B, pp. 2-3)

Martin acquired a sub-option from Jett, obtained feasibility studies from Gasoline Plant and reserve reports from Ogier, an independent Shreveport petroleum engineer, and met at Bank's offices the first week in January, 1961. Bank wanted DeLaat of Houston, whom it frequently employed, to check Ogier's reserve figures. To permit this check, Martin, with Bank's assurances to Jett, obtained an extension of the Martin-Jett option from January 10th to the close of business January 16, 1961. (R. 950-951, 1025-1027, 1112-1113, 1131-1138, 1163-1169, 1457-1497; Martin Dep. 347-365, 373-374; Weiler Dep. 392-393; Zwick Dep. 137, 139, 172-173; Bailey Dep. Ex. PB-12, 15-19, 21, 23, 24; Martin Dep. Ex. DM-16, 17; Appendix B, pp. 2-3)

C. *The Combination and Conspiracy*

For quite some time Bank, the fifth largest bank in the United States, had a substantial deposit relation with Phillips, the nation's leading processor of natural gas. Bailey of Bank in furtherance of his financial connections with Phillips, called Stradley, Phillips' financial vice-president, on January 12, 1961, and offered Phillips an opportunity to participate in Locust Ridge. Martin was not advised nor aware of this move by Bank. This call was made although Bailey had assured Martin, apparently moments before, that the financing was progressing to conclusion satisfactorily, and that Zwick, Bank's oil and gas manager, was arriving in Houston the next day. Bank's proposal to Phillips, being out of Stradley's department, was referred to McCullough, Phillips' vice-president in charge of gasoline plant acquisitions and operations, who was requested to call Bailey on the morning of Friday the 13th. (R. 89, 140, 576, 641, 951-952, 1027-1032, 1110-1113, 1131-1138, 1173-1187, 1254-1258, 1374-1376, 1393-1394, 1435-1443; Martin Dep. Ex. DM-16, 17; S.W. Bell Tele. Co. (Dallas) Dep. Ex. A-35; Appendix B, p. 3)

McCullough was immediately interested in Bailey's proposal because the plant and properties had long been coveted by Phillips. To this end:

(i) Phillips had considered building the plant in 1957, and

(ii) being unsuccessful had attempted to acquire an interest in the plant while it was being built.

(iii) Even after the plant was built, Phillips sought to purchase its liquids but the owners refused to sell Phillips an interest in either the plant or its liquids.

(iv) Early in 1960 the owners offered the plant to Phillips for $2,000,000.00 (the price which Phillips and Bank later paid for the plant) but the 1960 offer was rejected by Phillips because it was then considered overpriced.[3]

McCullough intensively reviewed the latest information on the Locust Ridge area to the point that when McCullough called Bailey on the 13th, he was fully prepared to make a firm offer of participation to Bank. Bailey for Bank and McCullough for Phillips then agreed (1) that Phillips be plant operator; (2) that Phillips would have a half interest after payout; and (3) would have the right to market the LPG's the plant produced. This substantially ousted Martin from his own deal. Also discussed was the Martin-Jett option and its short time limitations. Phillips and Bank representatives then arranged to meet on Monday the 16th at Phillips' Houston offices.[4] (R. 951-952, 1032-1040, 1254-1274, 1288-1292, 1300-1301, 1350-1356, 1377-1391; Ringham Dep. 144-151; Stradley Dep. 33-42; S.W. Bell Tele. Co. (Bartlesville) Dep. Ex. VII-10; Appendix B, p. 3)

Bailey then called Martin, and informed him of the Phillips contact.[5] Bailey stated Bank had no choice but to

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[3] Thus, as a result of the combination and conspiracy with Bank against Martin, and the use of the tax loss, Phillips was able to achieve on Friday the 13th what it had been unable to accomplish since 1957. (R. 759, 1060-1061, 1065-1067, 1310-1316, 1510; Arnsberger Dep. 39-43; Goth Dep. 12-17, 65-67; McCullough Dep. 18, 22-25; Ringham Dep. 75-76, 80-83, 85-89, 135-140)

[4] The clear purpose of the planned meeting of the 16th in Houston as described by Zwick ". . . was to see if we could get—arrive at some sort of an agreement to get Phillips into the deal with the rest of us, . . ." whereby Phillips would be "Operator of the plant and participate in it." (R. 1443)

[5] Bailey later conceded to Martin's associate Weiler that Bank "pulled" Phillips in. (R. 1192-1194, 1435, Martin Dep. Ex. DM-20, 20-A.)

join in the agreement with Phillips. Martin, taken aback, expressed shock and amazement. Bailey assured Martin there would be no deal without Phillips and advised Martin to take no action until Bailey arrived in Houston and could discuss the matter with Martin. (R. 1188-1190.)

On Sunday, January 15th, Martin's associate Weiler discussed the reserves study with DeLaat's office and was assured the reserves were favorable. But all other efforts by Martin to meet with Bailey, Zwick or Dr. Anderson of Bank were futile. (R. 1198-1199, 1398-1400, 1443-1445.)

Sunday afternoon, a Phillips negotiating team headed by McCullough was assembled in Bartlesville and flown to Houston on a company plane. This team included Ringham, head of joint ventures and plant acquisitions; Blume, an attorney; Edwards, a reservior engineer; Weaver, a gasoline plant engineer; and, because of the great importance of utilizing the tax loss, Baldwin, Phillips' tax consultant, who took extensive notes on the 12th, 13th, 15th and 16th, including meetings with Bank on the 16th, to which the district court denied petitioner access. (R. 535-547, 557, 987-995, 1274-1283, 1322-1328, 1331-1350, 1506-1508)

The last day of Martin's exclusive option, Monday, January 16th, began with a call from McCullough to Jett requesting Jett to come to Houston for the Bank-Phillips negotiations. Jett declined saying his agreement was with Martin. McCullough assured Jett that Phillips considered him a partner and would protect Jett's interests at the meetings. But Phillips made no effort to contact Martin. (R. 1141-1143, 1239, 1271-1275, 1299-1300)

About 9:30 A.M., on the 16th, the Phillips team and the Bank group consisting of Bailey, Zwick, Dr. Anderson, DeLaat and Gasoline Plant representatives, assembled at

Phillips' offices and conducted a systematic but unauthorized review of the Martin-Jett option, the Ogier reserves study, Gasoline Plant's plant and pipeline feasibility studies, all obtained by Martin and made available to Bank on a confidential basis. (R. 952, 985-987, 1040-1041, 1048-1050, 1053-1058, 1284-1285, 1295-1296, 1305-1308, 1356-1358, 1468-1480, 1498; Edwards Dep. 117-120, 128-134; McCullough Dep. 282-283; Zwick Dep. 223-225; Bailey Dep. Ex. PB-12; Appendix B, p. 4)

Hudson, nominal head of Texas San Juan, joined the meeting shortly before lunch and reported by phone to Martin on his way back to Dallas that Bank and Phillips were now treating Martin as a mere finder[6]; that Bank and Phillips were going to picture Martin's deal so poorly that it would not appear feasible; that the reserves were being downgraded and the whole deal torn apart. Hudson said he was powerless to protect Martin and had decided not to stay in town and "watch the goddamn' murder" of Martin's deal. (R. 1200-1201, 1499-1503, 1502)[7]

Repeated efforts by Martin to meet with Bank throughout the 16th were fruitless until late in the afternoon when he was permitted to attend the Bank-Phillips meeting. At this time about an hour remained before Martin's exclusive

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[6] Hudson further told Martin the Phillips-Bank group said he had contributed nothing except about $10,000.00 worth of reports, and " 'what he really is is a finder here,' and I [Hudson] said, 'Well, that isn't what he was; in other words, with our deal as a finder of the last half of the financing, and in my estimation the tough half, he was entitled to a 50-50 deal even though we knew he wasn't putting up any money, he was, nevertheless, causing the financing to be arranged for which you earned your half.' " (R. 1503)

[7] Interestingly on deposition Hudson explained his purpose in so reporting to Martin was ". . . to excite a feeling of sympathy between Bob Martin and myself as against the ogre Phillips." (R. 1124)

option expired. (R. 952, 1199-1201, 1402, 1450-1451; Appendix B, p. 4)

When Martin arrived at the Bank-Phillips meeting, Hudson's predictions proved true. Martin was falsely told that Phillips was there in an advisory capacity to Bank;[8] that Ogier's reserves were too optimistic and could not support a plant *capacity*[9] of 40,000 mcfd or 30,000 mcfd;[10] that Phillips owned or controlled substantial quantities of the new gas reserves contemplated to be dedicated to the plant;[11] that Phillips had a lawsuit against the plant;[12] and that marketing the new residue gas to Mississippi Power and Light Company was not tenable.[13] Phillips then stated it could not advise

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[8] If anything is clear it is that Phillips was representing itself and had come to conclude a deal on the terms agreed to between Bailey and McCullough on the 13th. (R. 1299, 1277-1279, 1274-1275, 1267-1268, 1350-1351; Footnote 4, supra)

[9] Italics and parenthetical expressions throughout are those of petitioner unless otherwise indicated.

[10] This statement was false in two particulars. First: Edwards of Phillips admitted shortly after Phillips took over operations of the plant that Ogier's reserve report was conservative and pressed Ogier to increase his figures (R. 708, 760). Second: DeLaat and Edwards made their findings of insufficient reserves based on the improper standard of sustained **throughput**—not **capacity**—the effect of which was to increase Martin's burden by 20% over the requirements of the Martin-Jett option. (R. 492, 584, 588, 1051, 1059, 1434; Edwards Dep. 294, 303-04.) For the distinction between **throughput** and **capacity** see footnote 18, infra, page 22. This method of computation was used to downgrade Martin's deal as Hudson of Texas San Juan had predicted. (R. 1499-1503.)

[11] Phillips did not own any of the new gas, much less the processing rights on the gas. (R. 1503)

[12] While considering the Feazel-Wheless offer to sell the plant for $2,000,000.00 Phillips discovered the plant was being inefficiently operated and had merely requested the owners to improve plant efficiency. (R. 1213-1215, 1406-1407)

[13] Later Bank and Phillips disclosed Phillips' hypocrisy when they made the sale of excess residue gas from the new reserves to Mississippi Power and Light Company one of two express conditions precedent to the acquisition. (R. 1297-1298, 1522)

Bank to conclude Martin's deal, and his *exclusive* option, as it had been honored by Jett, expired. (R. 1287-1288, 1404-1411)

Jett indicated he would honor his option with Martin until January 25 on a *non-exclusive* basis so that Jett would be free to deal with the first bona fide offer presented. Martin sought desperately to interest others in his option but was unable to accomplish in a little over a week what had taken more than six weeks to accomplish with Bank. (R. 760, 877-878, 952, 1219; Appendix B, p. 2)

Phillips meanwhile, having successfully prevented the exercise of Martin's option, proceeded with dispatch early on January 17th to "pick up the pieces"[14] of Martin's shattered deal. By March 27, 1961, Phillips had physical possession of the plant, its related facilities and was totally operating the properties. On April 27, 1961, the deal was formally closed, as Jett put it, on substantially the same basis he had agreed to with Martin—with one exception: Phillips ended up where Martin began. (R. 574, 640, 760-761, 952-953, 1075-1080, 1143-1147, 1237-1245, 1247-1251, 1288-1292, 1298-1299, 1301, 1350-1356, 1358-1370, 1527-1624; Appendix B, p. 4)

D. *The size of Phillips as an LPG producer-processor and the enhancement thereof by the combination and conspiracy.*

In 1960-1961, Phillips was the largest processor of natural gas liquids in the United States, processing approximately

[14] As McCullough reported to Phillips' operating committee March 27, 1961: "The deal as proposed by this (Martin) group fell through and our department picked up the pieces and through subsequent negotiations have reached agreements whereby the bank (respondent Bank) or its nominees will supply all monies." (R. 1510)

11% thereof, and continued its first rank into 1962-1963. (R. 563-564, 575-576, 631-632, 641; Oil and Gas Journal Surveys for Natural Gasoline Plants, 1960-1963)

The properties which Phillips and Bank acquired consisted of " . . . the *entire stock and assets* of the Tensas Gas Gathering Corporation[15] and the *entire stock and assets* of the Gas Industries Management Corporation . . ." together with the plant, all of which properties (including Tensas' pipeline) are operated by Phillips under agreements, the terms of which practically give Phillips permanent control of the properties. (R. 1510-1515, 1550, 1563-1565)

The relevant market for Locust Ridge LPG products was defined by Goth of Phillips as northeastern Louisiana and the Mississippi Delta north of Greenville, Mississippi, and Phillips was a substantial competitor therein. (R. 1061-1064)

Phillips' percentage of the relevant market was about 12% in 1959, and declined, according to a Phillips' employee, to about 6% in 1961. When Phillips obtained marketing control of approximately 25,000 gallons per day of LPG products from the Locust Ridge plant, the marketers and their approximate percentages in the relevant market were: Propane Corporation, 12%; Tuloma, 12%; Phillips, 12%-15%; Anchor, 20%, Warren, 33%, or five sellers controlling approximately 90% of the LPG products sold in the relevant market.

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[15] Tensas' pipeline facilities were regulated by the Federal Power Commission. To avoid regulation of the plant, Phillips had three nominees hold ostensible title to the Tensas pipeline until after the Federal Power Commission authorized Tensas' connection to the new reserves Jett dedicated, after which Texas San Juan acquired title as it had to other properties, all of which remained subject to Phillips' complete control. (R. 382-383, 573, 639, 652, 661, 1516-1523, 1527-1624, 1630-1643)

Subsequent to Phillips' acquisition of marketing control over the Locust Ridge plant LPG's Tuloma, a wholly owned subsidiary of Standard of Indiana, and Propane became affiliated, leaving these marketers and their approximate percentages in the relevant market: Phillips, 12%-15%; Anchor, 20%; Tuloma-Propane, 24%; Warren, 33%, or four companies controlling approximately 90% of the LPG products sold in the relevant market. (R. 570-576, 638-641, 660, 760-761, 931-936, 1061-1073, 1080-1102.)

REASONS FOR GRANTING THE WRIT

Summary of Reasons

I.

The Court of Appeals erroneously assumed controverted facts and then, based on such assumed facts, decided the threshold question as a matter of law that Martin had no business or property which could be the subject of injury under Section 4 of the Clayton Act (15 U.S.C. Section 15). On that holding the Court of Appeals affirmed the District Court without discussing the remaining issues. (See Appendix C.)

A. The Court erroneously assumed that Martin's option from Jett was so "burdened with infirmities" (Appendix A, p. 10) and that his relationship with Bank was so tenuous that Martin had no "property" within the meaning of such section of the Clayton Act (15 U.S.C., Section 15).

B. The Court further erroneously assumed that Martin was unprepared to "either enter the new business (of gas processing) or to expand his existing business to include the gasoline plant purchase and operation" (Appendix A, pp. 9-10) and thus had no "business" within the meaning of Section 4 of the Clayton Act (15 U.S.C., Section 15).

II.

This Court has never written on the meaning of the phrase "business or property" contained in Section 4 of the Clayton Act (15 U.S.C., Section 15), and such action is important to the private administration of the antitrust laws.

III.

The decision in this case of the Court of Appeals for the Fifth Circuit on "business or property" is in conflict with decisions of other Courts of Appeals.

IV.

The holding of the Court of Appeals erroneously affirming the summary judgment of the District Court which held that the actions of the respondents were not violations of the antitrust laws and in failing to hold that such actions did, as a matter of law, constitute such violations, is in conflict with the decisions of this Court and other Courts of Appeals.

A. The holding is in conflict with decisions holding such actions constitute unlawful exclusion of a competitor from substantial participation in a

market in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

B. The holding is in conflict with decisions holding such actions constitute a boycott in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

C. The holding is in conflict with decisions holding actions such as those of Bank in tying to the availability of its credit in Martin's behalf that he accept Phillips as dominant interest owner-operator of the plant and marketer of its products constitute a tying arrangement in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

D. The decision is in conflict with decisions holding that predatory combinations and conspiracies such as that between Bank and Phillips, the leading producer nationally of LPG products and a substantial seller in an oligopolistic relevant market, constitute attempts or conspiracies to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C., Section 2).

E. The decision is in conflict with other decisions holding that actions such as that of Phillips, a substantial existing competitor in the already oligopolistic Locust Ridge relevant market, in acquiring the assets of the competitive Locust Ridge corporations, constitute a violation of Section 7 of the Clayton Act (15 U.S.C., Section 18).

V.

The denial of discovery as affirmed by the Court of Appeals is contrary to the decisions of this Court and other Courts of Appeals.

Restatement And Argument Supporting Reasons

I.

The Court of Appeals erroneously assumed controverted facts and then, based on such assumed facts, decided the threshold question as a matter of law that Martin had no business or property which could be the subject of injury under Section 4 of the Clayton Act (15 U.S.C. Section 15). On that holding the Court of Appeals affirmed the District Court without discussing the remaining issues. (See Appendix C.)

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B. The Court further erroneously assumed that Martin was unprepared to "either enter the new business (of gas processing) or to expand his existing business to include the gasoline plant purchase and operation" (Appendix A, pp. 9-10) and thus had no "business" within the meaning of Section 4 of the Clayton Act (15 U.S.C., Section 15).

To reach these conclusions the Court of Appeals erroneously assumed that (1) Martin's exercise of his suboption from Jett "was conditioned on the ability to expand the plant to a processing capacity of 40,000 mcf of gas per day" [Appendix A, p. 10]; (2) that the

reserves made it "impossible" to expand the plant to a 40,000 mcfd *capacity* [Appendix A, p. 10]; (3) that (i) "a favorable reserve report by DeLaat" and (ii) a subordination by Jett of "his net profits interest to the loan payments" were each "a condition precedent to any financing" by Bank [Appendix A, pp. 4, 11]; (4) that Bank had the right to give Phillips Martin's deal[16] [Appendix A, pp. 5, 11]; (5) that Martin was not able to operate a gasoline plant [Appendix A, p. 9]; (6) that Martin "did not have the ability to finance the business" Appendix A, p. 9]; (7) that "Martin was a finder" [Appendix A, p. 11], which status the Court obviously concluded did not constitute "property"; (8) that the law of Louisiana prevented Martin's option from being valid [Appendix A, pp. 9, 11].

1. *The Court of Appeals was in error because Martin's right to exercise his option was not conditioned on expansion of plant capacity.*

The facts are that Martin's option was complete. To get the properties he had only to exercise his option. Any obligation he had to expand the processing capacity of the plant became operative only after he had exercised his option and Jett had performed. The Martin-Jett option made this clear. After setting out certain obligations of Jett on dedication of reserves, the option provides (R. 1465):

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[16] The Court said "The Bank was seeking an experienced plant operator, gas reserves, and a product market. All three were available in Phillips." (Appendix A, p. 5). Again, "It is true that the Bank, in a sense, gave Mr. Martin's find to Phillips." (Appendix A, p. 11). The first of these statements seems to assume Bank had the right to barter with Martin's deal, and both, especially the latter, seem to be tacit recognitions that Martin had a "property."

> "*The Weiler Group*[17] *agrees that in the event it elects to acquire said properties and securities* optioned to it hereunder and does so acquire the same, it will, *promptly after you have fulfilled your obligation to dedicate reserves* and execute contracts as set forth in the preceding paragraph:
>
> (a) expand the *capacity*[18] of the Locust Ridge Gas Processing Plant to the end that it will be capable of processing 40,000 mcf of gas per day in lieu of its present daily capacity of approximately 25,000 mcf; . . . (emphasis supplied)

It will be noted from the above quoted language that the obligation to expand was dependent (1) on Martin's first acquiring the properties and (2) further dependent on the prior obligation of Jett to dedicate reserves.

Further support of this interpretation comes from Jett and his associate Anderson, both of whom state the expanded plant capacity was to be determined by reserves and not by assigning an arbitrary capacity (R. 758-759, 876-877).

2. *The Court of Appeals was in error because the reserves were adequate for Martin's financing by Bank.*

DeLaat had reported to Martin's associate Weiler on January 15, 1961, that Ogier's reserves had checked out

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[17] Included Martin.

[18] Crucial to this case is a clear understanding of the material difference between **capacity** and **throughput**. As used in the oil and gas industry, **capacity** usually means the maximum amount of raw gas that a gas plant can efficiently process without material waste. On the other hand, **throughput** has reference to the amounts of gas, actual or projected, to be delivered on a sustained basis to the plant. **Throughput** is directly related to recoverable reserves, whereas **capacity** is determined by the contract requirements of residue gas purchasers, seasonal swing, the nature of the product to be extracted and the depth of extraction, as well as the amount of gas economically available. (R. 703, 708-709, 1317-1319)

(R. 1398-1400). Both DeLaat and Edwards at the January 16 meeting were computing sustained *throughput* as distinguished from *capacity* and determined that the plant would not support a sustained *throughput* of 40,000 mcfd. This distorted Martin's obligations. Bank has judicially admitted this fact in its original answer. DeLaat, supported by Edwards of Phillips, determined on January 16th a 33,000 mcfd *throughput* was feasible. Applying the industry accepted rule of thumb *throughput* is generally considered 80% of capacity, so a 33,000 mcfd *throughput* would normally require a plant of 40,000 mcfd *capacity*. (R. 492, 584, 1052; Edwards Dep. 294, 303-304)

James Anderson of Jett had reached almost the same results in 1960 with respect to *throughput* that DeLaat and Edwards of Phillips reached in 1961, and it was Anderson who supplied the 40,000 mcfd *capacity* figures to Jett. (R. 758-759, 707-708.)

The best evidence of the adequacy of the reserves is the fact that Bank did finance 100% of the acquisition on the same reserves and for a smaller residual interest than it would have had with Martin. (R. 1527, 1529, 1560, 1561-1562.)

3. *The Court of Appeals was in error because Bank's financing Martin was not conditioned (i) on a reserve report by DeLaat supporting a throughput of 40,000 mcfd, or (ii) on Jett's agreement to subordinate his interest.*

No one has yet testified that Bank's financing Martin was conditioned on a reserve report by DeLaat that would support a sustained *throughput* of 40,000 mcfd, or on Jett's interest being subordinated.

Bank simply engaged DeLaat to check the reserve figures of Ogier, and nothing was said about an independent reserve

determination by DeLaat as being a condition to Bank's financing. (R. 1165-1166.)

Subordination by Jett had not been made a condition by January 16th.[19] Subordination of Jett's interest to loan pay-out was passingly discussed with Jett in early January, 1961, but was never a condition of Bank's financing Martin (R. 1163-1164, 1175-1178.) Had Jett been pressed to subordinate there is every indication he would have agreed because his primary interest in the Locust Ridge transaction was to obtain a market for his undedicated shut-in gas. Jett also had 30,000 undeveloped acres in the Locust Ridge area and a gas market was essential to deveolping these reserves. (R. 759, 874-877, 1510-1511, 1514.)

When Bank and Phillips agreed on January 13 that Phillips was (i) to operate the plant for a fee, (ii) receive brokerage on the LPG's and (iii) have a 50% interest after pay-out, the problem then arose as to how to get Phillips 50% of the deal. (R. 951-952, 1269-1273.)

Clearly Phillips, Martin and Bank, or its nominee Texas San Juan, could not each own 50% and Jett have 12-1/2%.

After Bank and Phillips agreed it then became a problem of whose interest to reduce, because Bank on Friday the 13th told Martin Phillips' entry made everybody take less—including Bank, or its nominee Texas San Juan. By eliminating Martin, Bank and Phillips had only Jett with whom to deal. (R. 1189, 1433, 1440-1441.)

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[19] On the Sunday flight to Houston, January 15, McCullough told the Phillips team that the breakdown of interest in the Locust Ridge acquisition was: Robert Martin and associate 43.75%; Bank 43.75% and Jett 12.5%, figures obviously obtained by McCullough from Bailey on January 13. Nothing was said about subordination of Jett's 12.5% interest being a condition of Bank's financing Martin. (R. 1058, 1498).

4. The Court of Appeals was in error because Bank had no right to give Martin's deal to Phillips.

There is simply no conceivable theory which would justify Bank's surreptitious connivance with Phillips to exclude Martin and take over Martin's deal. The option was Martin's from Jett and was never assigned or contracted away to Bank. The reason given by the Court of Appeals for Bank contacting Phillips was that Bank was seeking an operator, reserves and a market (Appendix A, p. 5), which assumed reason, in addition to being contrary to the District Court's holding that Bank contacted Phillips to cultivate an old and cherished customer, assumed that Bank had a right over Martin's deal which Bank in fact did not have. (Appendix B, p. 5)

5. The Court of Appeals was in error because Martin was able to operate the plant.

Operating a gas processing plant does not require any degree of expertise by the person in charge of such operations because of the availability of competent personnel and consultants to take care of the technical features of the operations. Martin contemplated the use of such personnel and consultants, including Gasoline Plant, of whom Bank and Phillips thought very highly. (R. 702-705, 1264, 1428-1430.)

6. The Court of Appeals was in error because Martin had the ability to finance the acquisition.

The essence of the Bank-Martin deal was that Martin would exchange a 50% net interest in his optioned property for 100% financing by Bank. Thus, Martin had the

identical ability to finance that was eventually used in the acquisition and expansion.[20]

Using minimum valuations determined by Phillips in March, 1961, 100% of the properties covered by the Martin-Jett option would produce minimum net revenues after loan pay-out during the next 15 years of $2,553,-000.00. Martin agreed to convey to Bank, or its nominee Texas San Juan, a 43.5% interest which would produce minimum net revenues after loan pay-out of $1,110,555.00 during such 15 years. Under the agreement with Bank and Phillips, however, Bank financed 100% of the total acquisition and expansion for a net 24.5% interest which would produce only $625,485.00 in minimum net revenues after loan pay-out during such 15 years. (R. 1510-1514, 1560.)

7. The Court of Appeals was in error because if Martin was a "mere finder" he nonetheless had "business or property."

The Court of Appeals labeled Martin as a "finder" and held his status as a "finder" would not entitle him to maintain a private civil action for violation of the antitrust laws. (Appendix A, p. 11) There is nothing in the antitrust laws nor their case history which says that a "finder," if such Martin was, would have no "property" and therefore no standing to sue under the Clayton Act, Section 4.

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[20] In response to the question of what Martin contributed to the deal he replied, "First of all, I had the option on the deal. Secondly, we made numerous investigations and had some studies prepared. Third, we were requested by Mr. Bailey to enter in with them on the furtherance of this deal on the basis that the bank would finance it 100 per cent if we would agree that they could use the income for the purpose of recouping a tax loss, and his offer to advance a hundred per cent would be in lieu of any equity on their part by virtue of them being able to recoup the tax loss." (R. 1221)

8. The Court of Appeals was in error because Martin's recognized option was valid.

The law of Louisiana was not judicially noticed in the Southern District of Texas and clearly presents an issue of fact of foreign law. It is the settled policy of Louisiana courts to enforce contracts otherwise subject to Article 2440 of the Louisiana Civil Code if the parties to such contract interpose no objection. *Strawbridge v. Warfield,* 4 La. 20 (1832); *Packwood v. White,* 7 La. Ann. 31 (New Orleans 1852); *Pauline v. Hubert,* 14 La. Ann. 161 (New Orleans 1859). It is thus apparent that under Louisiana law Martin's exclusive option was "property" since both Martin and Jett honored it without equivocation through its oral extension. A contract thus valid, binding, and enforceable when so honored by the parties would clearly be property under the decisions of the Fifth Circuit. See *North Texas Producers' Association v. Young,* 308 F.2d 235 (C.A. 5, 1962), cert. den. 372 U.S. 929 (1963), and *Vines v. General Outdoor Advertising Company,* 171 F.2d 487 (C.A. 2, 1948).

The Court of Appeals in order to hold that Martin had no "business or property" made material the foregoing facts which it assumed. Each of these facts is erroneous or controverted in some degree by the parties. Therefore, each of the material controverted facts assumed by the Court of Appeals violates the cases of *Poller v. Columbia Broadcasting Co., Inc.,* 368 U.S. 464 (1962) and *United States v. Continental Oil Co.,* 377 U.S. 161 (1964), since a Court of Appeals has no more right to assume such facts on an appeal from a summary judgment than does a district court in granting such a summary judgment.

II.

This Court has never written on the meaning of the phrase "business or property" contained in Section 4 of the Clayton Act (15 U.S.C., Section 15), and such action is important to the private administration of the antitrust laws.

The Attorney General of the United States can give attention only to major violations of the antitrust laws.[21] This of necessity leaves many gaps in the administration of such laws. This Court has recognized the belief of Congress that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). See also *Radovich v. National Football League*, 352 U.S. 445, 454 (1957); *Lawlor v. National Screen Service Corporation*, 349 U.S. 322, 329 (1954); *Keifer-Stewart Co. v. Joseph Seagram and Sons, Inc.*, 340 U.S. 211 (1950).

At the heart of private enforcement is the question of what is "business or property" within the meaning of Section 4 of the Clayton Act. The importance of removing all obstacles consistent with due process is emphasized by the fact that in the majority of these treble damage actions involving smaller transactions, the plaintiff does not have the benefit of prior government action and

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[21] "There were 521 antitrust cases commenced in the district courts during 1965, or 75 more than were filed in 1964. This rise was due to a marked increase in private cases (exclusive of electrical equipment industry antitrust suits) filed, 443 in 1965 compared to 317 in 1964. The number of civil and criminal antitrust cases commenced by the Government decreased to the lowest number in the last 8 years." 1965 **Administrative Office of the United States Courts Director's Ann. Rep.** 119.

investigation as provided by Section 5 of the Clayton Act (15 U.S.C. Section 16).

This Court, however, notwithstanding the importance of the question, has not discussed the "business or property" concept. The need for clarification is strongly suggested by the Court of Appeals' opinion in this case in which the Court was somewhat mechanical in its analysis and in which strong emphasis was placed on state law—law fashioned for purposes unrelated to the antitrust laws. (Appendix A, p. 11)

The absence of a discussion of and holding on this important aspect of this major federal law is sufficient basis for granting the writ. *Continental Ore Co. v. Union Carbide and Carbon Corp., et al.*, 370 U.S. 690, 696 (1962); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 397 (1959); *Indian Towing Co. v. United States*, 350 U.S. 61, 63 (1955).

III.

The decision in this case of the Court of Appeals for the Fifth Circuit on "business or property" is in conflict with decisions of other Courts of Appeals.

The decision of the Fifth Circuit in this case is in conflict with that of the Ninth Circuit in *Jerrold Electronics Corporation v. Wescoast Broadcasting Company*, 341 F.2d 653 (C.A. 9, 1965), cert. den. 382 U.S. 817 (1965); with that of *Vines v. General Outdoor Advertising Company*, 171 F.2d 487 (C.A. 2, 1948); and with that of another panel of the Fifth Circuit in *North Texas Producers' Association v. Young*, 308 F.2d 235 (C.A. 5, 1962); cert. den. 372 U.S. 929 (1963).

The Fifth Circuit held in this case that Martin had no "business or property" that could be affected by respondents', combination or conspiracy, notwithstanding:

That Martin was in the oil and gas business; that he had incurred expenses toward the Locust Ridge acquisition of some $10,000.00 prior to the wrongful acts of respondents; that he obtained a written option on the Locust Ridge properties, later extended orally with Bank's assistance, to include the period in which such wrongful acts occurred; that Jett steadfastly adhered to the oral option though McCullough invited him to disregard it on the morning of January 16 and come to Houston to participate in direct negotiations with Phillips and Bank; that it is the settled policy of Louisiana courts to enforce contracts, otherwise unenforceable under Article 2440 of the Louisiana Civil Code, if the parties to such contracts interpose no objection. *Strawbridge v. Warfield*, 4 La. 20 (1832); *Packwood v. White*, 7 La. Ann. 31 (New Orleans 1852); *Pauline v. Hubert*, 14 La. Ann. 161 (New Orleans 1859)[22] that Martin's negotiations with Bank had reached such stage as early as December 18, 1960, that Bailey was writing to Martin with respect to "our joint enterprises"; that Bailey was reporting to all concerned during the week of January 9, while this oral extension was in effect, that the negotiations were progressing satisfactorily and that he saw no reason why the acquisition should not be consummated; that such conditions as there were in Martin's option, Jett indicated could have been worked out and met in the light of new facts, and that Hudson, president of Texas San

[22] These cases were cited to the Fifth Circuit, but they, and the point for which they stand, were apparently not considered in reaching the decision of the Court.

Juan, stated to the Phillips-Bank meeting on January 16, that Martin was more than a "finder".

In *Wescoast*, supra, the facts, in comparison to the above, disclosed—that plaintiff had not started its business at the time of the antitrust violation of defendants, having only an order pending for equipment which was never shipped (341 F.2d at pages 656, 657); that it was not prepared to fully finance its projected business enterprise, it having ultimately failed for lack of financing (Id. at 660); that in the face of the violation of defendants, plaintiff therein "voluntarily" abandoned its order for equipment (Id. at 658) "voluntarily" abandoned its business, and "voluntarily" sold out to its tormentors (Id. at 661). Nevertheless, plaintiff in Wescoast prevailed in a treble damage action which necessarily involved the holding that it had "business or property" at the time of the defendant's wrongs.[23]

There was more substance in Martin's business status, contracts and other relationships than there was in those of Wescoast.

In *North Texas*, supra, plaintiff Young had a contract which the Court assumed he could not fulfill because of defendant's conduct (308 F.2d at 245) Nevertheless the Court held that the plaintiff had business and property (Id. at 242-243, 245) This contrasts with the holding of the Court in the instant case that Martin's option was not property, though both parties to it steadfastly adhered to its obligations.

The holding in the instant case is in conflict with the holding of the Second Circuit in *Vines*,[24] supra. There

[23] **Wescoast** was cited to, but overlooked by, the Fifth Circuit.

[24] **Vines** was also cited to, but not discussed by, the Fifth Circuit.

Vines had no contract of any character with defendant or anyone else. He had only a reasonable expectation of continued dealings with defendant. (171 F.2d at 491) The Court in 171 F.2d at 491, said persons could have property:

> ". . . though they have no contract with the wrongdoer, but only an expectation of future dealings with him . . . The absence of any contract obligation gave the defendant no more immunity from that tort than from any other tort."

These conflicts warrant issuance of the writ. *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 314 (1965); *Waterman Steamship Corp. v. United States*, 381 U.S. 252, 258 (1965); *United States v. Muniz*, 374 U.S. 150, 151 (1963); *Knetsch v. United States*, 364 U.S. 361, 362 (1960); *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 110 (1960).

IV.

The holding of the Court of Appeals erroneously affirming the summary judgment of the District Court which held that the actions of the respondents were not violations of the antitrust laws and in failing to hold that such actions did, as a matter of law, constitute such violations, is in conflict with the decisions of this Court and other Courts of Appeals.

A. The holding is in conflict with decisions holding such actions constitute unlawful exclusion of a competitor from substantial participation in a market in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

The record establishes that substantial interstate commerce is involved; that respondents combined to foreclose Martin from the relevant market and give marketing control of the Locust Ridge products to Phillips, an already substantial competitor in such market. The holding of the Court of Appeals affirming the holding of the trial court that such combined exclusionary action of respondents was not a violation of Section 1 of the Sherman Act, and in failing to hold, that such conduct constituted such violation, is in conflict with the decisions of this Court in *United States v. General Motors Corp., et al.*, ____ U.S. ____ 86 S.Ct. 1321 (1966); *United States v. First National Bank and Trust Co. of Lexington*, 376 U.S. 665 (1964); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Associated Press v. United States*, 326 U.S. 1 (1945); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); and with the following decisions of other Courts of Appeals: *Girardi v. Gates Rubber Company Sales Div., Inc.*, 325 F.2d 196 (C.A. 9, 1963); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (C.A. 9, 1963); *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (C.A. 1, 1952), cert. den. 344 U.S. 817 (1952); *American Federation of Tobacco Growers v. Neal*, 183 F.2d 869 (C.A. 4, 1950); *Paramount Pictures, Inc. v. United Motion Picture Theater Owners of Eastern Pennsylvania, Southern New Jersey and Delaware*, 93 F.2d 714 (C.A. 3, 1937).

In *International Salt* this Court said in 332 U.S. at Page 396 that it is ". . . unreasonable, per se, to foreclose competitors from any substantial market."

In *Lexington* this Court said of *Northern Securities* at 376 U.S. 670:

"A violation of Section 1 was adjudged without reference to or a determination of the extent to which the traffic of the combined roads was still subject to some competition. It was enough that the two roads competed, that their competition was not insubstantial, and that the combination put an end to it."

B. The holding is in conflict with decisions holding such actions constitute a boycott in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

It is undisputed in the record:

That under the arrangement contemplated by Martin, Bank and Texas San Juan, Martin was to have, subject to Jett's interest, a 50% net profits interest after payout of the acquisition and expansion loans and was to be the operator of the plant and the marketer of its products; that without Martin's knowledge and consent Bank, on January 12, 1961, contacted Phillips with respect to Martin's deal, in which contact Bank and Phillips agreed, without even a proviso that it would be subject to Martin's approval, that Phillips would become the 50% net profits owner, be the operator of the plant and the marketer of its products; that when Martin objected, a Phillips team of high-ranking officials and staff members came to Houston, and on the day Martin's exclusive option was to expire, went into closed session with Bank officials and consultants employed by Martin, neither notifying Martin of the time and place of the meeting, nor inviting him to it; downgraded Martin to the role of a "finder" at best; and at the end of the day advised him his deal would not go and offered him a reduced participation in a revised deal, Phillips to occupy the position formerly contemplated for Martin.

The holding of the Court of Appeals affirming the holding of the district court that such actions did not constitute a boycott of Martin in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, and in failing to hold that such conduct did, as a matter of law, constitute such violation, is in conflict with the following holdings of this Court and of other federal courts. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc., et al.*, 359 U.S. 207 (1959); *Associated Press v. United States*, 326 U.S. 1 (1945); *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941); *Jones Knitting Corp. v. Morgan*, 361 F.2d 451 (C.A. 3, 1966); *Washington State Bowling Proprietors Association, Inc. v. Pacific Lanes, Inc.*, 356 F.2d 371 (C.A. 9, 1966), cert. den. ____U.S.____, 86 S.Ct. 1590 (1966); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (C.A. 9, 1960) [Rev. 370 U.S. 19 (1962), because the entities charged with combination were, in legal contemplation, one and could not combine].

The fact that the plan of respondents did not oust Martin completely, but would have left him with half a loaf, does not excuse the violation. *Silver v. New York Stock Exchange*, supra; *Klor's, Inc. v. Broadway-Hale Stores, Inc., et al.*, supra; *Fashion Originators' Guild of America v. Federal Trade Commission*, supra. This Court in *Silver* put that point to rest in a footnote in 373 U.S. at Page 348 when it stated:

> "Nor does any excuse derive from the fact that the collective refusal to deal was only with reference to the private wires, the member firms remaining willing to deal with petitioners for the purchase and sale of securities (citing authorities) . . . That is enough to create a violation of the Sherman Act."

C. The holding is in conflict with decisions holding actions such as those of Bank in tying to the availability of its credit in Martin's behalf that he accept Phillips as dominant interest owner-operator of the plant and marketer of its products constitute unlawful tying arrangements in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

It is undisputed on the record that Bank had, on January 13, 1961, almost 100% monopoly power over the credit for financing the acquisition of the Locust Ridge properties. Its controlled corporation had a tax loss carry forward in excess of $2,000,000.00 The record is affirmatively to the effect, and without dissent, that this tax loss carry forward was in fact the key to the acquisition of the Locust Ridge properties. (R. 569-570, 637-638, 1252-1254, 1313-1314, 1358) Furthermore, on January 13, 1961, when Bank and Phillips made their agreement, Martin's exclusive option had approximately 3½ days to run, two of which were a Saturday and a Sunday. That was an incredibly short time for Martin to acquire other financing of this magnitude, even if the tax loss had not been the key. It is also undisputed on the record that Bank contacted Martin and tied to the extension of its credit the services of Phillips as operator of the plant and marketer of its products. The holding of the Court of Appeals affirming the decision of the trial court that, as a matter of law, such tying by Bank was not a violation of Section 1 of the Sherman Act (15 U.S.C., Section 1), and in failing to hold that, as a matter of law, such tying activities of Bank did constitute such violation of such section, is in conflict with the holdings of this court and of other Courts of Appeals. *United States v. Loew's, Inc., et al.*,

371 U.S. 38 (1962); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958); *International Salt Co. v. United States*, 332 392 (1947); *Jerrold Electronics Corporation v. Wescoast Broadcasting Company*, 341 F.2d 653 (C.A. 9, 1965); cert. den. 382 U.S. 817 (1965); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960); second appeal, 324 F.2d 566, (C.A. 4, 1963); *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545 (E.D. Pa. 1960), aff'd per curiam 365 U.S. 567 (1961).

The fact that Bank did not control or have a monopoly of the lending of money generally is beside the point. What was involved was the financing by Bank of the acquisition and expansion of the Locust Ridge properties under the facts and circumstances of this case as they existed between January 13 and January 16, 1961. In *Northern Pacific*, supra, this Court said of tying arrangements at 356 U.S. 6:

> "They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."

In the instant case Bank had the requisite monopoly power and the commerce involved was substantial.

D. The decision is in conflict with decisions holding that predatory combinations and conspiracies such as that between Bank and Phillips, the leading producer nationally of LPG products and a substantial seller in an oligopolistic relevant market, constitute attempts or conspiracies to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C., Section 2).

The trial court found that Bank, in bad faith with Martin, combined its tremendous economic advantages with those of Phillips to eliminate Martin from participation as a competitor in the Locust Ridge relevant market in an attempt to create a monopoly, Bank being prompted so to do by its desire to increase in favor "with an old and cherished customer, and with an eye to increased future business . . ." (R. 953-954; Appendix B, p. 5). The trial court nevertheless concluded, which holding was affirmed by the Court of Appeals, that such conduct did not constitute an attempt to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2. (R. 955-956; Appendix B, pp. 7-8). Such decision is in conflict with the decision of this Court in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 61 (1911), and with that of the Ninth Circuit in *Lessig v. Tidewater Oil Company*, 327 F.2d 459, 474-475 (1964), cert. den. 377 U.S. 993 (1964), and with that of the Eighth Circuit in *National Wrestling Alliance v. Myers*, 325 F.2d 768 (1963).

In Tidewater the oil company was charged with tying TBA items to the lease of its station and the sale of its products in an attempt to monopolize in violation of Section 2. The Court of Appeals held that probability of actual realization is not an essential element in an attempt case where there is intent; that relevant market was not an issue in an attempt or conspiracy to monopolize case, and that Section 2 prohibits "attempts to monopolize 'any part' of commerce and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products." (327 F.2d at 474-475)

In *Wrestling Alliance,* the Court said that monopoly power in an attempt to monopolize case was a consequence of a combination or agreement. (325 F.2d at 774)

E. The decision is in conflict with other decisions holding that actions such as that of Phillips, a substantial existing competitor in the already oligopolistic Locust Ridge relevant market, in acquiring the assets of the competitive Locust Ridge corporations, constitute a violation of Section 7 of the Clayton Act (15 U.S.C., Section 18).

The decision of the trial court, affirmed by the Court of Appeals, acknowledged that Phillips had acquired assets of Locust Ridge corporations (R. 959; Appendix B, pp. 10-11). This is consistent with the holding of the court in *United States v. Columbia Pictures Corporation,* 189 F.Supp. 153 (S.D.N.Y. 1960), which appears to be the only decision of any court on doubtful facts on the meaning of "assets" as used in Section 7. It is submitted that it is important to the administration of Section 7 of the Clayton Act that this Court speak on the meaning of "assets" in the context of the facts presented in this case.

The record further discloses that the Locust Ridge relevant market for LPG products was oligopolistic before Phillips acquired the assets in question and became decidedly more so by such acquisition and by a subsequent affiliation of two other competitors in such market.

The holding of the Court of Appeals affirming the decision of the trial court that such acquisition of assets did not constitute a violation of Section 7 of the Clayton Act and in failing to hold that said acquisition did constitute such violation is in conflict with the following holdings of this Court: *United States v. Pabst Brewing Co., et al,*

____U.S.____, 86 Sup.Ct. 1665 (1966); *United States v. Von's Grocery Co.*, ____U.S.____, 86 Sup.Ct. 1478 (1966); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

The degree of concentration in the relevant market in most of the above cases was not as great as that in the instant case and in this case we have the additional factor that the acquisition was made by combination.

V.

The denial of discovery as affirmed by the Court of Appeals is contrary to the decisions of this Court and other Courts.

The trial court, in sustaining objections of the respondents, refused to require officers of Phillips (R. 207, Item III; R. 209, Items VI, 1 and 2; R. 306, Item (1); R. 537-538, Items 1, 2, 3 and 5; R. 557) and Bank (R. 257, 263-265, Items (1)-(30); 394-395) to produce documents, notes and memoranda made by them containing reports on, or records of, the essence of the critical conferences held between and among them between January 12 and January 16, 1961, and immediately thereafter. The trial court completely ignored the distinction between the worth of written records made at the time of the events by parties free of the brainwashing effects of litigation, as compared to the oral testimony of witnesses given years thereafter, when their minds and memories have been conditioned by the incessant pressures of self-interest. The

ruling of the Court of Appeals which affirmed the decision and rulings of the trial court on these issues of discovery is in conflict with the decision of this Court in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), in which this Court said, at Pages 114-115:

> ". . . with the basic premise 'that the deposition-discovery rules are to be accorded a broad and liberal treatment,' *Hickman v. Taylor*, 329 U.S. supra, at 507 . . . to effectuate their purpose that 'civil trials in the federal courts no longer need be carried on in the dark'."

Such holdings of the trial court are also in conflict with the following decisions of other federal courts: *United Airlines, Inc. v. United States*, 186 F.Supp. 824 (D.C.D. Del. 1960); *Brauner v. United States*, 10 F.R.D. 468 (E.D. Pa. 1950).

CONCLUSION

The importance of the issues involved in this case seems apparent, as does the need for an express treatment by this Court of the issues under Sections 1 and 2 of the Sherman Act and Sections 4 and 7 of the Clayton Act as applied to the facts of this case. It is submitted that it has been demonstrated that the holding of the Court of Appeals on the issues of "business or property" is in conflict with decisions of other Courts of Appeal. It is also submitted that the holdings of the district court affirmed by the Court of Appeals are in direct conflict with holdings of this Court and of other Courts of Appeal on like issues in other cases.

WHEREFORE, and for the reasons stated, a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

A. A. WHITE
BEN H. SCHLEIDER, JR.
EARL O. LATIMER II

By _____
Ben H. Schleider, Jr.

Attorney for Petitioner,
ROBERT H. MARTIN

CERTIFICATE OF SERVICE

I, BEN H. SCHLEIDER, JR., one of the attorneys for petitioner, and a member of the bar of the Supreme Court of the United States, hereby certify that copies of this petition have been served on counsel for respondents, by mail, in accordance with Rule 33 of the Supreme Court Rules, on this_____ day of October, 1966.

_____
Ben H. Schleider, Jr.
Attorney for Petitioner

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 22,493

ROBERT H. MARTIN, *Appellant*,

versus

PHILLIPS PETROLEUM COMPANY, ET AL.,
Appellees

Appeal from the United States District Court for the Southern District of Texas.

(July 26, 1966.)

Before BELL and THORNBERRY, Circuit Judges and FISHER, District Judge.

BELL, Circuit Judge: This appeal involves a suit for treble damages brought under § 4 of the Clayton Act. 15 USCA, § 15. The suit is premised on alleged violations of §§ 1 and 2 of the Sherman Act, 15 USCA, §§ 1, 2; and §§ 3 and 7 of the Clayton Act, 15 USCA, §§ 14 and 18. Summary judgment was entered in the District Court for the defendants.[1]

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[1] The principal defendants are Phillips Petroleum Company and the Chemical Bank New York Trust Company. The other defendants are corporations and individuals who participated in the transaction which forms the subject matter of the suit to the extent described.

Robert Martin, the plaintiff-appellant, charged that the defendants-appellees combined and conspired to restrain and monopolize interstate commerce in violation of the Sherman Act by taking over and replacing him in the acquisition of a gasoline plant (Locust Ridge), and related properties. He also charged that the acquisition of the stock and assets of corporations owning the Locust Ridge properties resulted in a substantial lessening of competition in violation of § 7 of the Clayton Act. The § 3 of the Clayton Act charge is not pursued on this appeal. He asserted that the displacement injured him in his business and property.

We reach only the first issue: Was Martin injured in his business or property within the scope of § 4 of the Clayton Act? Being of the view that he was not, we affirm.

I.

In the fall of 1960, defendant George H. Jett, a Shreveport oil and gas operator, obtained an option to purchase the Locust Ridge gasoline plant, its gas purchasing and processing contracts, and gathering facilities for $1,800,000. His hope was to find a buyer for the plant.[2]

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[2] The Locust Ridge gasoline plant is located in Tensas Parish, Louisiana, near the Mississippi River, and processes natural gas gathered by a pipeline system from fields in northeastern Louisiana and northwestern Mississippi. The plant was put in operation in 1958 by its owners, the Feazel-Wheless group, with Tensas Gas Gathering Corporation, a defendant, owning the gas gathering pipeline system and the actual plant operations being conducted

One prospect for the properties was Martin, an independent oil and gas operator who had been engaged in exploring for, producing, transporting, and marketing oil and gas, and doing first stage processing of gas. While on business in New York in November, 1960, Martin inquired of Bailey, an officer of appellee Bank, whether the Bank would be interested in financing the purchase if Martin could work things out with Jett. At that time Bank controlled defendant Texas San Juan, a corporation engaged in other phases of the oil and gas business. Texas San Juan had a substantial federal income tax loss carry-forward and was indebted to the Bank. Recognizing the possibility of using Texas San Juan as a vehicle for acquiring the Locust Ridge properties, thereby utilizing the tax loss, and perhaps collecting its debt, Bank expressed immediate interest.

Martin then obtained an exclusive sub-option from Jett on December 29, 1960. Under its terms Martin was offered the plant and related properties for $2,000,000, provided that he would expand the plant capacity sufficiently to accommodate Jett's shut-in gas. Jett was also to have an one-eighth net profits interest. The sub-option would expire January 10, 1961. It was later orally extended to January 16, and then to January 25.

Meanwhile, Martin continued his negotiations with the Bank. It was contemplated that the loan would be made

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by Gas Industries Management Corporation, also a defendant. The plant processed wet gas, sold the natural gas and LPG products extracted therefrom in northeastern Louisiana and northwestern Mississippi and disposed of the dry gas outside the area.

to Texas San Juan, and title to the properties would be taken in its name. After payout of the loans, Martin and Texas San Juan would each have a 50% interest in the venture, and Martin would operate the plant. Martin was to provide the Bank with tests and surveys of the plant and its reserves. A condition precedent to any financing was a favorable report by De Laat, also a defendant, as to the sufficiency of the reserves to support the expansion of the plant required under the sub-option. This condition was necessary to meet the terms of the sub-option which required an expansion of the plant from a processing capacity of 25,000 Mcf of gas per day to 40,000 Mcf per day. The Bank demurred to the one-eighth override which Jett was to receive, and told Martin that Jett would have to defer receiving any income until the proposed loans were paid. The De Laat report disclosed insufficient reserves. No subordination agreement was ever obtained from Jett, although he submitted an affidavit in which he stated that he would not have insisted on the expansion if the reserves, as it turned out, would not have warranted the expansion. His purpose was to insure the sale of his shut-in gas.

During the week of January 9, 1961, Bailey and Martin had several telephone conferences. The substance of these was that Bailey felt the negotiations were progressing satisfactorily. Bailey indicated to Jett at about this time that the Bank would determine whether it would make the loan on January 16; and if so, the Bank would pay Jett earnest money of $200,000 on that date.

On January 12, 1961, Bailey contacted an officer of Phillips to discuss the Locust Ridge properties. Phillips had a substantial deposit and a cordial business relation-

ship with the Bank. Phillips expressed interest,[3] but insisted that business be done on its terms: that Phillips would operate the plant; receive a 50% interest in the facilities after pay-out of the loans; and receive brokerage fees for the sale of its products. The Bank was seeking an experienced plant operator, gas reserves, and a product market. All three were available in Phillips. The parties agreed to pursue the matter further at a meeting to be held on January 16. Bailey then called Martin to tell him of Phillips' interest and of the January 16 meeting. Martin protested Phillips being brought into the deal, and commenced a search for financing elsewhere the next day. Neither Martin nor his representative were invited or in attendance at the morning meeting which consisted of representatives of Phillips, the Bank, De Laat, and others. At this meeting, materials furnished by Martin to the Bank were made available to Phillips. Martin was brought into the meeting that afternoon and was informed that his original proposal was not acceptable to the Bank. He was offered participation in a revised deal submitted by Phillips, whereby he would have received a three-sixteenths overall interest. Martin rejected this counterproposal; withdrew his loan application; and proceeded in

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[3] Phillips, having considered building such a plant in 1957, had attempted to acquire an interest in the plant while it was being built. After the plant was built, Phillips sought to purchase its liquids, but the owners refused to sell Phillips an interest in either the plant or its liquids. However, in early 1960, they offered the plant to Phillips for $2,000,000. Phillips concluded that the plant was overpriced and refused the offer. The interest of Phillips in the Locust Ridge properties was due to the plant's strategic location which afforded Phillips an opportunity to market its products in areas which it could not otherwise economically serve.

his efforts to obtain financing elsewhere. Unable to obtain such financing, his sub-option expired unexercised on January 25, 1961.[4]

II.

In a treble damage suit brought under the federal anti-trust laws, plaintiff must allege and prove that he has seen "injured in his business or property" by acts of the defendant proscribed by § 4 of the Clayton Act, 15 USCA, § 15.[5] Martin admitted that he had never been engaged in either the ownership or operation of a gasoline plant or in marketing the products thereof. He stated that he had engaged in the leasing, exploration, drilling, gas processing, as well as the operation and management of producing oil and gas properties and the sale and marketing of products therefrom. He had also engaged in the gathering and transporting of natural gas. Recognizing this fact, appellees argue that there must be injury to an actual going business; that it is improper to consider the oil and gas business generally as a single business for purposes of the antitrust laws; that the management of producing properties is a business separate and distinct from the operation of a gas plant; hence, since appellant had never engaged in the business of operating a gas plant, he had no business which appellees could injure, but only an expectancy or hope of entering a new business.

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[4] The sub-option to Martin was not exclusive from January 16 to January 25.

[5] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, . . ."

In support of this position they cite *La Rouche v. United Shoe Machinery Corporation*, D. Mass., 1958, 166 F.Supp. 633, where the court held that research in shoe manufacturing and machinery was not the same business as the manufacture of shoe machinery, although both were part of the shoe industry. They also rely on the case of *Brownlee v. Malco Theatres, Inc.*, W.D.Ark., 1951, 99 F.Supp. 312, in which the court refused to hold that a former theater manager who was attempting to buy a theater, but who did not own one, was in the motion picture business, even though he had formerly been in the business and had some experience in it. The case turned on the fact that he had only a hope; he did not complete his negotiations for the purchase of the theater and it was sold to another.

On the other hand, Martin maintains that the oil and gas industry is a single business for the purpose of § 4 of the Clayton Act; that he was in business in that industry; that the right to expand was an integral part of his business; and that he was injured in his business when he was prevented from expanding through the purchase of the gasoline plant. His thesis apparently is that the expansion was prevented by the combined activity of Phillips and the Bank; Phillips by taking his place in the proposed purchase, and the Bank by making this possible through its refusal to finance him.

The court will pursue a somewhat different line of reasoning in disposing of these arguments. Martin may establish the requisite injury under § 4 by showing injury to business or property, and we will examine the business aspect first.

There are numerous decisions stating that one need not have an actual going business to obtain standing, but an attempt to enter a business is sufficient. *Triangle Conduit & Cable Co., Inc. v. National Electric Products Corporation*, 3 Cir., 1945, 152 F.2d 398; *American Banana Co. v. United Fruit Co.*, 2 Cir., 1908, 166 F.2d 261; *Waldron v. British Petroleum Co., Ltd.*, S.D.N.Y., 1964, 231 F. Supp. 72; *Delaware Valley Marine Supply Company v. American Tobacco Company*, E.D. Penn., 1960, 184 F. Supp. 440. However, these decisions lay down two significant requirements. First, there must be the intention to enter the business; and second, there must be a showing of preparedness to enter the business. This is the rule in this circuit. See *North Texas Producers Association v. Young*, 5 Cir., 1962, 308 F.2d 235, *cert. den.*, 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed.2d 733, where the court stated the rule, and that the plaintiff there met the business requirement. However, the precise holding is based on a finding of injury to property, a contract, rather than injury to a business.

Here we deal with the contention that a business expansion was envisioned, and we hold that the same rule applies. There must be a showing of intent to expand and of preparedness for the expansion. Mr. Martin manifested the required intent by obtaining the sub-option from Jett and entering into negotiations with the Bank. However, there was a complete failure to demonstrate the necessary "preparedness" for acquisition of the Locust Ridge properties. In *Waldron v. British Petroleum Co., Ltd., supra*, it was stated:

> "The legal content of 'business or property,' for the purpose of § 4 of the Clayton Act is flexible. In the absence of a statutory specification of the attributes of business or property,' the courts have spelled out on an ad hoc basis the factual situations that measure up to the required showing of 'business or property' . . . . In determining whether a plaintiff has proved the requisite intention and preparedness, the courts have looked for varying combinations [of several elements] . . ." p. 81.

Some of the elements considered by the courts include the ability of plaintiff to finance the business and to purchase the necessary facilities and equipment, *Waldron v. British Petroleum Co., Ltd., supra;* the consummation of contracts by the plaintiff, *North Texas Producers Association v. Young, supra;* affirmative action by plaintiff to enter the business, *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 2 Cir., 1908, 166 F. 254; *The Washington Professional Basketball Corporation, Inc. v. The National Basketball Association*, S.D.N.Y., 1956, 147 F.Supp. 154; and the background and experience of plaintiff in the prospective business, *Peller v. International Boxing Club, Inc.*, 7 Cir., 1955, 227 F.2d 593, *Rossman v. Pullman Co.*, S.D.N.Y., 1936, 15 F.Supp. 325. Viewing the instant case against these elements, we find that appellant by his own admission had no experience in the operation of a gas plant. He did not have the ability to finance the business, but was hoping to obtain 100% financing from the Bank. He made no investment in facilities or equipment. He had no contract with the Bank, and his sub-option from Jett was a nullity under the Louisiana law. Thus, it seems plain that Martin was unprepared to either enter the new business or to expand his existing

business to include the gasoline plant purchase and operation. He was thus not injured in his business within the meaning of § 4.

We come next to whether he suffered injury to his property. This means that we must first determine whether there was property to be injured. The words business or property are used in the statute in the disjunctive. And whether appellant has property within the meaning of the statute would appear to depend on whether what he possessed was deserving of legal protection. *Waldron v. British Petroleum Co., Ltd., supra.* If property is to be found anywhere in the instant case, it must be found either in Mr. Martin's business relationship with the Bank, or in his sub-option with Jett.

Under the authorities, Martin's inchoate business relationship with the Bank does not qualify as property. *Peller v. International Boxing Club, Inc., supra; Waldron v. British Petroleum Co., Ltd., supra; Brownlee v. Malco Theatres, Inc., supra.* In *Waldron,* the court stated that an advantageous business relationship per se is not sufficiently substantial to amount to a business. The loan application to the Bank does not qualify as property. There was no contract between Martin and the Bank, only a loan application in the progress of negotiation, and there was no obligation under the circumstances from which legal rights and duties might flow.

It is true that Martin had a sub-option from Jett, but it was burdened with infirmities. It was conditioned on the ability to expand the plant to a processing capacity of 40 Mcf of gas per day. The reserves made this impossible although Jett indicated, as stated, that he might have

waived this condition. Jett had not subordinated his net profits interest to the loan payments.

Furthermore, the sub-option expired prior to the first contact between the Bank and Phillips on January 12, 1961. Thus, Martin held only an oral option on immovables after January 10, 1961. Since the properties were located in Louisiana, his sub-option was governed by the Louisiana Statute of Frauds. Article 2440 of the Louisiana Civil Code declares oral contracts of this nature a nullity, not only as to the parties to the contract, but to third persons as well.[6] See *Hoth v. Schmidt*, 220 La. 249, 56 So.2d 412 (1951). Only a valid contract would be property subject to the protection of § 4. *North Texas Producers Association v. Young, supra.*

We conclude that no genuine issue of fact existed as to Mr. Martin's standing to sue. He was not injured in his business or property and thus could not make the showing necessary to obtain relief under § 4. The essence of the case is that Mr. Martin was a finder; he sought to promote his find through Bank financing, and was unsuccessful. The Bank decided not to make the loan. It is true that the Bank, in a sense, gave Mr. Martin's find to Phillips. The remedy for this occurrence if any, is not a suit under the anti-trust laws.

In view of our holding on standing, it is unnecessary to reach the other assignments of error.

AFFIRMED.

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[6] "All sales of immovable property shall be made by authentic act or under private signature. Except as provided in Article 2275, every verbal sale of immovables shall be null, as well as for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22493

D. C. Docket No. 14032—Civil Action

ROBERT H. MARTIN, Appellant,

versus

PHILLIPS PETROLEUM COMPANY, ET AL., Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before BELL and THORNBERRY, Circuit Judges and FISHER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Robert H. Martin, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 26, 1966

Issued as Mandate: Aug. 17, 1966

APPENDIX B

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CIVIL ACTION NO. 14,032

ROBERT H. MARTIN, *Plaintiff*

v.

PHILLIPS PETROLEUM CO., ET AL., *Defendants*

January 29, 1965

[1845]

MEMORANDUM:

This case is before the Court on motion by plaintiff, Robert H. Martin, for summary judgment on the issue of liability; and motions by Phillips Petroleum Co., Chemical Bank New York Trust Co., Texas San Juan Oil Corporation, and all other defendants (who play an insignificant role herein), for summary judgment.

The material, undisputed facts in the case are as follows:

1. Prior to November, 1960, George Jett acquired and held an option from the then owners to purchase certain properties, including a plant to extract gasoline and LPG products from wet gas, a pipe line and gathering system, contracts for the purchase of such gas, etc., referred to collectively as the Locust Ridge Plant, in northeastern Louisiana near the Mississippi border. The plant processed wet gas from reserves located in northeastern Louisiana and northwestern Mississippi, sold the natural gasoline and

LPG products extracted therefrom in that area, and disposed of the dry gas outside of the area.

[1846] 2. Prior to November 1960, plaintiff had been interested in the possibility of purchasing the plant, but was unable to do so without extensive financing. In November 1960, while in New York on other business, plaintiff mentioned that fact to Bailey, an officer of defendant Chemical Bank New York Trust Co. (Bank), and inquired whether Bank would be interested in financing the purchase. Coincidentally, at that time Bank controlled Texas San Juan Corporation (Texas San Juan), a corporation engaged in other phases of the oil and gas business, and which had as its principal attraction a substantial tax loss carry-forward. Because of this, Bank expressed an immediate interest in the Locust Ridge Plant, with the thought that with Texas San Juan being used as the vehicle through which the property was acquired, advantage thus might be taken of its tax loss carry-forward.

3. As a result of this initial meeting between plaintiff and Bank, plaintiff intensified his negotiations with Jett, and succeeded in acquiring on December 29, 1960, a [1847] sub-option to buy the Locust Ridge properties for $2,000,000, the option to expire by its terms on January 10, 1961. This was later orally extended by Jett to January 16, 1961, and still later to January 25, 1961.

4. Meanwhile, plaintiff's negotiations with Bank continued. It was contemplated that the loan would be made to Texas San Juan, and title to the propeprties taken in its name. It was also contemplated that after the payout of the loans, Martin and Texas San Juan each would have a 50% interest in the venture, and that Martin would op-

erate the plant. Martin supplied certain technical tests and surveys of the plant, of its reserves and of the availability of gas in the area, etc.

5. On January 10, 1961, Bailey, of Bank, indicated to Martin that he felt the negotiations were progressing satisfactorily, and that he knew of nothing that would interfere with the consummation of the transaction. On the same date, Bailey indicated to Jett that the deal looked good, and that Bank would determine on Monday, January 16, [1848] 1961, whether it would make the loan; and if so, Jett would be paid earnest money of $200,000 on that date.

6. On January 12, 1961, Bailey, of Bank, called an officer of Phillips to discuss the Locust Ridge transaction. A cordial business relationship had existed for several years between Bank and Phillips, and Phillips kept a substantial deposit with Bank. On Friday, January 13, another officer of Phillips called Bailey at Bank to discuss the Locust Ridge transaction further. During the course of this conversation, Bailey inquired whether Phillips would be interested in participating in the transaction, and McCullough, of Phillips, outlined the basis on which Phillips would be interested. The terms, as outlined by McCullough, were (1) that Phillips would operate the plant; (2) would receive the brokerage fees for the sale of its products; and (3) that Phillips would receive a 50% residual interest after payout of the loan. This proposal, obviously, would depose Martin as operator of the plant, and necessarily reduce his [1849] residual interest well below 50%. Both parties to the conversation expressed an interest in pursuing the matter further, and a meeting on January 16, in Houston, was agreed upon.

7. The meeting on January 16 was held in the absence of plaintiff or any representative of plaintiff. In attendance at the meeting were representatives of Phillips, and Bank, and certain parties who had prepared the studies and surveys of the Locust Ridge properties submitted to Bank. These materials, furnished by Martin to Bank, were made available to Phillips. During the late afternoon of that day, Martin came to the meeting and was informed that his original proposal was not acceptable to Bank. He was offered participation in the deal on the basis proposed by Phillips, whereby Martin would have had perhaps a 10% to 20% residual interest.

8. Martin rejected the counter-proposal, withdrew his loan application, requested return of his reports, surveys, etc., and proceeded to seek financing elsewhere. In this he was unsuccessful; and his sub-option, which had [1850] been orally extended by Jett to January 25, 1961, expired unexercised.

9. The defendants approached Jett about dealing with them. A few months later, the purchase of the plant by Texas San Juan was consummated on terms very similar to those proposed by plaintiff, with the exception that Phillips now occupied the position plaintiff would have occupied had the transaction been consummated as plaintiff originally planned.

10. A further fact which may be relevant has to do with the motives which actuated the conduct of Bank and Phillips in the period January 13-16, as result of which Bank agreed to make the loan only on the terms which Phillips suggested. Bank contends that it always was interested in securing an experienced and competent operator

for the plant, and that the plaintiff could not qualify in this particular; that it had made no commitment to plaintiff other than to advise him on January 16 whether it would or would not make the loan upon his terms; that when its decision was reached and announced on that date, plaintiff withdrew his loan application, gathered his documents, and sought financing elsewhere. Bank contends that throughout it was actuated only by legitimate business considerations. The plaintiff contends that both these defendants with their tremendous economic advantages, desired to eliminate or greatly diminish his participation, in order to permit Phillips to secure a dominant position in the market of gasoline and LPG products in the relevant market area; that the purpose, and effect, of inviting Phillips' participation was unreasonably to restrain trade, to create a monopoly, or attempt to do so, and to eliminate him (Martin) as a possible competitor of Phillips in the relevant market area. For present purposes, plaintiff's contentions as to the motives of the defendants, if relevant, must be accepted. It will be considered that Bank, in inviting Phillips into the trade, was doing so to favor an old and cherished customer, with an eye to increased future business; it will be considered that the Bank was not dealing [1852] in good faith with Martin in the period January 13-16; and it will be considered that Phillips was desirous of extending and expanding its influence and participation in the market for the products of the Locust Ridge Plaint.

11. The relevant market area may not be determined with certainty. Plaintiff alleges that an area within a radius of 200 miles of the plant, encompassing parts of northeast Louisiana and northwest Mississippi may appropriately be

considered for this purpose. The defendants make no objection, though they cite figures showing Phillips' participation in the market for various areas.

During the years 1958-1961, Phillips marketed approximately 10-12% of the LPG products in this northwest Mississippi, northeast Louisiana market area, ranking near the bottom among the producers in total production of LPG products. Six or seven other competing companies enjoyed a larger percentage of this market, one such company producing approximately 33% of the LPG products.[1] [1853] The addition of Locust Ridge increased Phillips' nation-wide production by approximately 6/10 of 1%.[2] In the State of Louisiana, Phillips operates two gasoline plants in addition to the one in question.[3] Locust Ridge production is less than 1% of all production within the state.[4] Phillips' total daily Louisiana production (from its three plants) is 124,000 gallons, while a single competitor in the state has a daily production of 1,200,000 gallons. Fourteen competing companies have greater Louisiana production than does Phillips.[5] Phillips has no plant in Mississippi.[6] Plaintiff has not alleged or offered anything tending to show that Phillips' position [1854] in the relevant

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[1] Plaintiff's Brief, p. 191; Defendants' Reply Brief, p. 13.

[2] Plaintiff's original complaint alleged that Phillips produced approximately 100,000 barrels per day of natural gas liquids from 1959 to 1961. The Locust Ridge Plant supplied 560 barrels per day of this total.

[3] The Oil and Gas Journal, March 25, 1963, "1963 Survey of U.S. and Canadian Gas Processing Plants," p. 128, attached as Exhibit 1 to Defendants' Motion for Summary Judgment.

[4] Ibid, pp. 127-130.

[5] Ibid.

[6] Ibid, p. 130.

market area was any greater, due to the acquisition of the Locust Ridge Plant than its relative position in the States of Louisiana or Mississippi.

In his first amended petition, plaintiff alleges that the foregoing facts constitute a violation by defendants of Sections 1 and 2 of the Sherman Act (Title 15, U.S.C. §§1 and 2) and of Sections 3 and 7 of the Clayton Act (Title 15, U.S.C. §§14 and 18), all of which injured plaintiff in his business or property, and entitled him to recover treble damages therefor, under the provisions of Title 15, U.S.C. §15.

The primary purpose of the anti-trust laws is to protect the public from the harmful results of unrestricted limitations on commerce. Standard Oil Co. v. U.S., 221 U.S. 1 (1911). The rights granted to a private litigant by the anti-trust statutes are secondary in purpose, and before there can exist a private cause of action for violation of the Sherman Act, there must be an injury or potential injury to the public welfare, as well as a [1855] private injury. Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Wm. Filene's Sons Co. v. Fashion Originators' Guild of America, 90 F.2d 556 (1st Cir. 1937); Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), cert. den. 355 U.S. 954.

The factors to be considered in determining whether there has been a public injury are the power and ability to control prices, control production, change in the quality or quantity of the goods or services, and the power to exclude competition from the market. U.S. v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956); Wm. Filene's Sons Co. v. Fashion Originators' Guild of America, supra; Gam-

co, Inc. v. Providence Fruit and Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952), cert. den. 344 U.S. 817. There is no showing of price control, substantial control of production, or a change in the quality or quantity of goods or services in this case. If an unreasonable restraint of trade or monopoly or attempted monopoly in violation of Sections 1 and 2 of the Sherman Act are to be shown, it must be done by showing that the [1856] defendants had and exercised the power to exclude competition from the market to the detriment of the public welfare. Not every act done in combination or conspiracy constitutes an anti-trust violation. One engaged in business has the right to refuse to deal with another for reasons deemed sufficient to itself, so long as that refusal does not produce the prohibited result. U.S. v. Colgate & Co., 250 U.S. 300 (1919); Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir. 1963), cert. den. 375 U.S. 922.

The undisputed facts reveal that Phillips was and remains a minor factor in the relative market area, with only 10-15% of the market. There are several plants in the area owned by various competing companies, many of which are larger producers than Phillips. While the exclusion of one potential competitor from the market undoubtedly may indicate a power to exclude competition in detriment to the public welfare, see e.g. *Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc.*, supra; *Bale v.* [1857] *Glasgow Tobacco Board of Trade, Inc.*, 223 F.Supp. 739 (W.D.Ky. 1963), the facts show that the circumstances peculiar to this transaction combined to exclude Martin. Had the business relationships between Martin and Bank and Bank and Texas San Juan not existed; or had plaintiff chosen to seek financing of the acquisition from some financial institution

other than defendant Bank, the result achieved in the instant case would not have been possible. Clearly neither Phillips, Bank nor Texas San Juan, acting individually or in concert, has the power substantially to lessen or exclude competition in the relevant market area. Their actions did not constitute or produce a restraint of trade, monopoly or attempted monopoly, but simply disappointed the expectations of a potential minor competition in the relevant market area. Defendants' acts did not violate Sections 1 or 2 of the Sherman Act, Title 15, U.S.C. §§ 1 and 2.

Section 3 of the Clayton Act, Title 15, U.S.C., § 14, prohibits any lease, sale or contract for sale of [1858] "goods, wares, merchandise, machinery, supplies, or other commodities," on condition or agreement that the lessee or purchaser will not use or deal in the goods or commodities of a competitor of the lessor or seller, the effect of which may be substantially to lessen competition or tend to create a monopoly. This section is aimed at so-called "tying-agreements," and the gravamen of the offense is that the lease or sale of goods or commodities on condition of agreement produces the prohibited result. McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959). Applying the wording of the statute to the fact situation involved, it becomes manifestly evident that the transaction involved does not fall therein. Here Bank attempted to tie the participation of Phillips and its services as operator of the plant to the extension of credit on Martin's behalf. There was no agreement that Martin would not deal with a competitor of Bank. He was entirely free to, and did, seek the financing he desired [1859] elsewhere. There is no suggestion that Bank, Phillips, or any other defendant impeded or interfered with his efforts in

this respect. Plaintiff urges the Court to conclude that the conspiracy between Bank and Phillip to consummate this transaction in some way united them into one entity for the purposes of this statute, so that others in competition with Phillips became competitors of Bank. Plaintiff cites no authority for his proposition, and it seems to put an unnatural strain on the clear import of the statute.

Moreover, it has been held that the rule of *ejusdem generis* requires that the phrase "or other commodities," as used in the statute, be confined to articles of the same kind, class and character as those specifically enumerated. U.S. v. Investors Diversified Services, 102 F. Supp. 645 (D.Minn. 1951). That case further held that a loan of money did not fall within the transactions prohibited by the statute. [1860] Plaintiff alleges, as a violation of Section 7 of the Clayton Act, Title 15 U.S.C. §18, that as a result of the transaction complained of, Phillips acquired the assets of Tensas Gas Gathering Corp. and Gas Industries Management Corp., the result of which may have been substantially to lessen competition or to have tended to create a monopoly. Tensas was the owner of the pipe line system which services the Locust Ridge Plant. Its capital stock, pursuant to agreement among the defendants, was acquired by designee's of the defendants, Newton Edwards and Creigh. Gas Industries operated the Locust Ridge Plant, and its stock was acquired by Texas San Juan. It must be assumed for the purposes of this motion, that by acquiring full control over the operation of the plant and approximately 50% interest therein after pay-out, Phillips acquired assets of the two corporations. May the effect of this be substantially to lessen competition, or may it tend to create a monopoly?

[1861] The purpose of Section 7 was to prevent the creation of trusts, conspiracies and monopolies "in their incipiency and before consummation. . . .". S. Rep. No. 698, 63d Cong., 2d Sess. 1. However, there must be a reasonable probability that the prohibited results will be accomplished; a mere possibility will not suffiice, albeit the use of the word "may" in the statute. U. S. v. E. I. du Point de Nemours & Co., 353 U.S. 586 (1957). The facts clearly show that the acquisition of the Locust Ridge Plant, and as a consequence assets of the two Locust Ridge corporations, did not increase Phillips' minor share of the market to a position of dominance or potential dominance. The Locust Ridge Plant and its attendent facilities are relatively minor factors in the relevant market area. Had Martin instead of Phillips acquired the plant and control over its operations, he would have been a minor competitor in the relevant market area. The acquisition by defendants of these companies did not tend to create a monopoly or substantially to lessen competition.

[1862] After the most exhaustive discovery touching every phase of this controversy, this record falls far short of showing a cause of action for violation of the anti-trust laws. No doubt feeling a sense of outrage at the rather cavalier treatment which he received at the hands of defendant Bank, and with appetite whetted by visions of treble damages, plaintiff has pursued this anti-trust phantom, rather than the more substantial common law claim for interference with contractual negotiations. Counsel advise that such an action, filed contemporaneously with this, is pending in the state court. Plaintiff should look there for relief.

The motion of plaintiff for summary judgment on the issue of liability is denied; and the motions of the several defendants for summary judgment are granted.

Done at Houston, Texas, this 29th day of January, 1965.

BEN C. CONNALLY
United States District Judge

APPENDIX C

SPECIFICATION OF ERRORS

The Court erred in holding, based upon the facts found by the Court and other material record facts as to which there is no genuine issue, that, as a matter of law:

I. The combination and actions of Bank, Phillips and Texas San Juan to substantially take over and replace Martin in the acquisition of the Locust Ridge Properties did not constitute a combination or conspiracy in restraint of trade under Section 1 of the Sherman Act, 15 U.S.C., Section 1, and in failing to hold that said combination and actions did, as a matter of law, constitute such violation of said section.

II. The combination and actions of Bank, Phillips, Texas San Juan and other defendants herein to substantially take over and replace Martin in the acquisition of the Locust Ridge properties did not constitute a boycott of Martin in violation of Section 1 of the Sherman Act, 15 U.S.C., Section 1, and in failing to hold that said combination and actions did, as a matter of law, constitute such violation of said section.

III. The actions of Bank in tying the services of Phillips with its onerous conditions to the granting of its credit to Texas San Juan in Martin's behalf was not a violation of Section 1 of the Sherman Act, 15 U.S.C., Sec. 1, and in failing to hold that, as a matter of law, said actions did constitute such violation of said section.

IV. The acquisition by Phillips, Texas San Juan and other defendants herein of the Locust Ridge properties and the actions of Bank, Phillips and Texas San Juan in connection therewith did not constitute a conspiracy

to monopolize or an attempt to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C., Section 2, and in failing to hold that said actions did, as a matter of law, constitute such violation of said section.

V. The acquisition by Phillips of stock and assets of corporations owning and operating portions of the Locust Ridge properties did not vioalate Section 7 of the Clayton Act, 15 U.S.C., Section 18, and in failing to hold that said acquisition did, as a matter of law, constitute such violation of said section.

VI. Phillips, Bank and Texas San Juan, acting in concert, did not have the power to exclude competition from the relevant market area in violation of either Section 1 or 2 of the Sherman Act. 15 U.S.C., Sections 1 and 2, and that their actions with respect to Martin in the acquisition of the Locust Ridge properties did not constitute such action and violation.

VII. The Court erred in holding that defendants' motions for summary judgment should be granted and that of Martin denied because Martin had failed to show an actual or potential injury to the public other than or in addition to, Martin's injury by the combination, conspiracy, boycott, tying and other unlawful activities of defendants of which Martin complained.

VIII. The Court erred in holding that the only factors to be considered in determining the requisite injury under the antitrust laws were the power and ability to control prices, control of production, change in the quality or quantity of goods or services, and the power to exclude competition from the market.

In the alternative to the portions of the foregoing points complaining of the failure of the Court to make certain holdings, appellant will rely upon the following further points:

IX. The Court erred in holding that there were no genuine issues as to the material facts necessary to establish either a combination, a conspiracy, a boycott or a tying arrangement in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C., Section 1.

X. The Court erred in holding that there were no genuine issues as to the material facts necessary to establish a combination or conspiracy to monopolize or an attempt to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C., Section 2.

XI. The Court erred in holding that there were no genuine issues on the material facts necessary to establish the acquisition by Phillips of stock and assets in Locust Ridge corporations in violation of Section 7 of the Clayton Act, 15 U.S.C., Section 18.

XII. The Court erred in sustaining the objections of Phillips, as reflected by order entered on December 26, 1962, to Plaintiff's Interrogatories I through VII as contained in Plaintiff's Amended Motion to Produce Documents for Inspection, Copying and/or Reproducing.

XIII. The Court erred in sustaining by his order of June 3, 1963, the Objections of Phillips to Second Interrogatories of Plaintiff to Defendant, Phillips Petroleum Company, as such Second Interrogatories were modified by Plaintiff's Reply to Defendant Phillips' Objections to Plaintiff's Second Interrogatories.

XIV. The Court erred by his order of February 27, 1963, in sustaining Bank's motion to quash subpoenas duces tecum directed to Walter M. Ross, George W. Cox, Jr., Joseph A. McFadden, Hulbert S. Aldrich, Clinton C. Johnson, Grenville H. Paynter and Walter V. Shipley as to item 32 thereof and in sustaining the motion in its entirety to quash the subpoena duces tecum directed to Judson L. Anderson.

XV. The Court erred by his order of April 4, 1964, in setting aside its prior order granting leave to orally depose Joseph A. McFadden and directing that witness' deposition be taken on written interrogatories.

XVI. The Court erred by his order of April 21, 1964, in sustaining Phillips' motion to quash the subpoena duces tecum directed to witness E. A. Baldwin.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 690

ROBERT H. MARTIN,

Petitioner,

v.

PHILLIPS PETROLEUM COMPANY, ET AL,

Respondents.

RESPONDENT PHILLIPS PETROLEUM COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 12, 1966

FIDELITY PRINTING COMPANY, INC., HOUSTON

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In The

Supreme Court of the United States

October Term, 1966

No. 690

Robert H. Martin,

Petitioner,

v.

Phillips Petroleum Company, et al,

Respondents.

RESPONDENT PHILLIPS PETROLEUM COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner's pleading and proof, including his own deposition, viewed in the light most favorable to him, establish that his total complaint is that the Respondent Phillips,* rather than Petitioner Martin, became the owner of an approximate 50% residual net profit interest in, and operator of the Locust Ridge gasoline plant, and that the other Respondents combined with and aided the Respondent Phillips in bringing about this result. Because this does not constitute a violation of any of the federal antitrust laws and because it affirmatively appeared that Petitioner had not been "injured in his business or property" as required by Section 4 of the Clayton Act, Respondents moved early in the cause to dismiss for failure to state a claim upon which relief could be granted. (R. 78.) In denying the motion

* The parties will be referred to in the same abbreviated form used in the Petition.

Judge Hutcheson significantly noted that "in my own view, the allegations of the complaint make out very little more than a case of common law interference with contractual relations * * *" but stated that decision of the question "should be made as the issues clarify themselves through the development of the evidence." (R. 124.)

The Petitioner thereafter ranged far and wide through the fields of discovery with some 35 separate depositions in New York, Shreveport, Bartlesville, Dallas, and Houston, totaling 8,162 transcribed pages of deposition testimony and thousands of pages of documents and exhibits. In addition hundreds of pages of answers to interrogatories were supplied by Respondents to Petitioner.* On the basis of this voluminous and exhaustive record the District Court granted Respondents' motions for summary judgment, confirming Judge Hutcheson's sage, and by then two-year-old, forecast as follows:

> "After the most extensive discovery touching every phase of this controversy, this record falls far short of showing a cause of action for violation of the antitrust laws. * * *" (R. 959.)

The Court of Appeals affirmed the summary judgment in favor of Respondents on the ground that Petitioner, who under the undisputed evidence: (i) had never owned or operated a natural gasoline plant; (ii) required 100% financing to acquire the gasoline plant covered by his suboption; (iii) had no contract for the financing of such acquisition; (iv) failed to satisfy substantial conditions precedent to the financing and to the acquisition; and (v) held only an oral extension of an expired suboption which was void under applicable Louisiana law was not "injured in

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* All of this material is included in the record on appeal, but only a small part of it has been printed.

his business or property" when certain Respondents, with financing by Respondent Chemical Bank, acquired the gasoline plant and attendant facilities which Petitioner had previously made an unsuccessful attempt to acquire in conjunction with Respondent Texas San Juan Oil Company with financing by Respondent Chemical Bank.

The Court of Appeals capsuled Petitioners' case, indulging every reasonable inference from the material undisputed facts in his favor, as follows:

> "The essence of the case is that Mr. Martin was a finder; he sought to promote his find through bank financing, and was unsuccessful. The Bank decided not to make the loan. It is true that the Bank, in a sense gave Mr. Martin's find to Phillips. The remedy for this occurence, if any, is not a suit under the anti-trust laws."

QUESTIONS PRESENTED

(1) The first two questions presented in the Petition for Writ of Certiorari, if accurately stated in the context of the case, would be combined as follows:

> Whether Petitioner, who under the undisputed evidence had never owned or operated a natural gasoline plant, required 100% financing to acquire the gasoline plant covered by his sub-option, had no contract for the financing of such acquisition, failed to satisfy substantial conditions precedent to the financing and to the acquisition, and held only an oral extension of an expired suboption which was void under applicable Louisiana law was "injured in his business or property" when certain Respondents acquired the gasoline plant and attendant facilities with financing by Respondent Chemical Bank which Petitioner had previously made an unsuccessful attempt to finance through Respondent

Chemical Bank and to acquire in conjunction with Respondent Texas San Juan.

(2) The third, fourth, fifth, and sixth questions presented by the Petitioner, if accurately stated in the context of this case, would be combined as follows:

> Whether a commercial combination between Respondent non-competitors under which certain Respondents acquired a gasoline plant and its attendant facilities with financing by Respondent Chemical Bank which Petitioner had theretofore unsuccessfully sought to acquire with attempted but unconsummated financing through Respondent Chemical Bank constituted a violation of Sections 1 or 2 of the Sheman Act (15 U.S.C. § 1) or Section 7 of the Clayton Act (15 U.S.C. § 18).

(3) The seventh question presented in the Petition, if accurately stated in the context of this case, would be as follows:

> Whether the Trial Court abused its discretion in limiting discovery in certain instances when Petitioner took more than 8000 pages of deposition testimony from 35 witnesses in four states, and received thousands of pages of documents from Respondents and hundreds of pages of interrogatory answers from Respondents.

STATEMENT OF THE CASE

Petitioner's Statement of the Case does not present with accuracy, brevity, and clearness that which is essential to a ready and adequate understanding of the points requiring consideration as required by Rule 23, paragraph 4, and is not free from burdensome, irrelevent, immaterial, and scandalous matter as required by Rule 40 of the Rules

of this Honorable Court. Both the opinion of the Court of Appeals and the opinion of the District Court contain a full statement of all of the material facts developed during extensive discovery in terms most favorable to the Petitioner. To the extent that Petitioner's Statement of the Case departs from the statements of the undisputed facts as contained in these opinions, the departures are either exaggerations, or misstatements of the record. Many are purely inflammatory and have no real bearing on the case. Some of the more pertinent misstatements of the record will be dealt with under specific points in the argument in this brief.

REASONS WHY THE WRIT SHOULD BE DENIED

The petition for writ of certiorari should be denied for each and all of the following reasons:

(1) The Court of Appeals correctly held that under the undisputed evidence, viewed in the light most favorable to Petitioner, it appears as a matter of law that Petitioner has not been "injured in his business or property" as required by Section 4 of the Clayton Act.

(2) The judgment of the Trial Court and the judgment of the Court of Appeals are correct and sustainable on still other grounds.

(3) The decision under review is not in conflict with any prior decisions of this Court or of any of the other Courts of Appeals. Decisions of other Courts of Appeals on the same point upon which the decision under review was based have been denied review by this Court.

SUMMARY OF THE ARGUMENT

I. Petitioner, who had never been engaged in the business of owning or operating a gasoline plant and who lacked the preparedness and capacity to enter that business, was not "injured in his business" when Respondents acquired the property which Petitioner had hoped to obtain. Petitioner was not "injured in his property" because he had no valid property rights which were affected.

II. The decisions of the courts below should be sustained on the additional ground, not reached by the Court of Appeals, that under the undisputed facts Petitioner does not make out an antitrust case but at most shows an ordinary commercial association aimed at helping Respondent Phillips compete with Petitioner Martin for the operation of and 50% residual ownership interest in a small gasoline plant with Phillips and the Respondents associated with it emerging as the successful competitors.

III. The Trial Court did not abuse its discretion but ruled correctly on certain matters which resulted in minor curtailments of Petitioner's exhaustive and massive discovery undertakings inasmuch as (i) Petitioner did not employ the proper procedures and (ii) similar discovery had been denied to Respondents.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS THAT PETITIONER WAS NOT "INJURED IN HIS BUSINESS OR PROPERTY" IS CORRECT.

The Court of Appeals and the District Court found and the Petitioner testified that he had never had any connection or experience with either the ownership or the opera-

tion of a gasoline plant, i.e., he was not in and had never been in the gasoline plant business (R. 1220). The Court of Appeals and the District Court found and the undisputed evidence establishes that the Petitioner Martin required 100% financing to exercise the Jett suboption by paying $2,000,000 for the acquisition of the Locust Ridge gasoline plant and its attendant facilities, i.e., in order to get into the gasoline plant business (R. 1220). Petitioner concedes that Respondent Phillips had rejected a 1960 offer to sell this plant to it for $2,000,000 because the plant was overpriced. (Pet. for Cert., p. 11), and that the only likely prospect for 100% financing of the plant acquisition at that figure was the Respondent Chemical Bank because the tax loss carry forward controlled by it "was in fact the key to the acquisition of the Locust Ridge properties" (Pet. for Cert., p. 36). The Court of Appeals and the District Court found and the undisputed evidence establishes that Petitioner Martin never did consummate a contract with Respondent Chemical Bank for the financing and that, on the contrary, the Bank decided not to make the loan for the acquisition of the properties on the basis proposed by Petitioner.

On these ultimate facts the Court of Appeals correctly held that Petitioner Martin's unsuccessful attempt to get into the gasoline plant business through promoting the Respondent Chemical Bank to finance the Respondent Texas San Juan Oil Company in the acquisition of the Locust Ridge Plant did not constitute either "business or property" under Section 4 of the Clayton Act. This decision is not in conflict with but is consistent with prior decisions of this Court and of the Courts of Appeals.

In *Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U.S. 55 (1918), this Court laid the basis for the rule applicable here that nebulous and uncertain ventures do not constitute

the "business or property" necessary to support a treble damage action. In that case a former employee chartered a corporation to compete with DuPont Company when it was "at the height of its power" and then brought a treble damage action alleging that the defendant's monopoly power caused its failure. This Court held that the plaintiff "knew all the elements of the situation before he embarked on the venture" and hence "did not stand like a competitor that had been in existence while the defendant's influence was being developed and that had been injured in its business during the course of such development — that the mere existence of defendant's power as it was when the plaintiff was born was not in itself a cause of action to the plaintiff." As Mr. Justice Holmes stated it:

> "The plaintiff could not be called into being in order to maintain a suit for conduct that made it not pay to be born." 248 U.S. at 64.

One commentator has appraised the effect of *Buckeye* as follows:

> "Mindful of *Buckeye's* warning, the courts have often relied upon factors that led to the conclusion that the venture itself was nebulous. The crucial elements are an intent to enter business plus *substantial preparedness* to do so." 64 Columbia Law Review, 570, 577.

The decision of the Court of Appeals in this case is entirely consistent with and supported by the decisions of the other Courts of Appeals which have uniformly held that a mere purpose and mere attempt to promote a venture into a going business will not suffice to establish "injury" to "business" under the statute, even though the attempt may have been thwarted by the defendants. *Triangle Conduit & Cable Co.* v. *National Electrical Products Corp.*, 152 F. 2d 398 (3d Cir. 1945); *Lawlor* v. *National Screen Service Corp.*, 270 F. 2d 146 (3d Cir. 1959), *cert. denied*, 362 U.S.

922 (1960); *Duff* v. *Kansas City Star Co.*, 299 F. 2d 320 (8th Cir. 1962), where the plaintiff who had formerly been a newspaper publisher prepared to resume publication by renting an office, arranging for printing, and making an extensive survey of the advertising and newspaper markets; *Peller* v. *International Boxing Club, Inc.*, 227 F. 2d 593 (7th Cir. 1955), where the plaintiff was attempting to enter the professional boxing promotion business and had negotiated and reached terms with two fighters, received assurances of a site for the bout and of financial support, but had no signed contracts; and *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963), where a manufacturer of roofing materials intended to go into the new line of manufacturing asphalt shingles and roll roofing but had not purchased machinery to do so and in which the court stated:

> "Preparedness and capacity to engage in a business mean more than an intention to do so and an ability to buy the necessary facilities."

In none of these analogous cases has this Court seen any necessity for review.

The factors determinative of whether a plaintiff has been "injured in his business" under the statute have been stated to be as follows:

> "(1) The background and experience of plaintiff in his prospective business;
>
> "(2) affirmative action on the part of plaintiff to engage in the proposed business;
>
> "(3) The ability of plaintiff to finance the business and the purchase of facilities and equipment necessary to engage in the business; and

"(4) consummation of contracts by plaintiff."

Timberlake, *Federal Treble Damage Antitrust Actions*, (1965), p. 23. Under the undisputed evidence Petitioner Martin fails to come within at least three of these four factors.

Under the undisputed evidence, Petitioner Martin not only had no contract for the financing of the plant acquisition with the Respondent Chemical Bank or with anyone else; had not only failed to comply with essential conditions precedent to any such contract, e.g., the subordination of the Jett interest and the furnishing of reserve reports on *new gas* showing total reserves sufficient to support a plant with a *daily throughput* of 40 million cubic feet per day upon which the proposed financing had always been predicated (R. 1222, 1228, 1392); but also had no valid, enforceable suboption for the acquisition of the Locust Ridge Plant since the written suboption had expired by its terms and the oral extension thereof was void under applicable Louisiana law. Accordingly, Petitioner Martin sustained no injury to "property" within the meaning of Section 4. The most that the Petitioner Martin had in his negotiations with Chemical Bank and under his oral suboption from Jett was a promising business relationship. The most that the undisputed evidence, viewed in the light most favorable to the Petitioner Martin, would establish is "an interference with prospective economic advantage" which does not constitute "injury to property" because "mere expectations and hopes are not the type of legal interests protected by Section 4." 64 Col. L. Rev. 570, 580. Negotiations that do not ripen into a contract do not constitute "property" under Section 4. *Peller* v. *International Boxing Club, Inc.*, 227 F. 2d 593 (7th Cir. 1955); *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (E.D. Pa. 1953), aff'd, 211 F. 2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954); and *Melrose*

Realty Co. v. *Loew's, Inc.*, 234 F. 2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956).

The reasonable expectation which Petitioner Martin may have had that Jett would honor his oral suboption did not constitute "property" under Section 4. Louisiana law and Petitioner's own admissions make it clear that the "oral suboption" did not give him any legal rights. Article 2440 of the Louisiana Civil Code declares such an oral contract to "be null, as well as for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted." This Court in *Keogh* v. *Chicago & Northwestern Railway Company*, 260 U.S. 156, 163, (1922), discussing injury to business or property under the statute, squarely held that:

"Injury implies violation of a legal right."

Petitioner Martin had no "legal right" in the oral suboption and hence no "property". The Louisiana statute and the case of *Hoth* v. *Schmidt*, 220 La. 249, 56 So. 2d 412 (1951), were presented to the district court in Respondents' brief in support of the motion to dismiss. Petitioner suggests that the state law is not applicable in this treble damage action and complains about the Court of Appeals' opinion placing "strong emphasis" on state law — "law fashioned for purposes unrelated to the antitrust laws." It is clear that state law determines whether the oral suboption was enforceable or a nullity and then federal antitrust law is looked to for determining whether there was injury to business or property. The recent decision of this Court in *Wallis* v. *Pan American Petroleum Corporation*, 384 U.S. 63 (1966), held that the Louisiana statute of frauds here involved is valid, applicable, and controlling as applied to assignments of federal oil and gas leases despite the contention that some kind of federal common law should be evolved instead.

THE COURT DID NOT ASSUME ANY MATERIAL CONTROVERTED FACTS

At pages 20 and 21 of his brief Petitioner alleges that the Court of Appeals made eight assumptions of controverted facts in arriving at its conclusion that Martin was not injured in his business or property. Viewing the opinion as a whole, these criticisms seem carping and not dispositive of the case even if Petitioner's contentions were correct. But as the following seriatim treatment of these eight assertions from the Petition will show, Petitioner's complaints are entirely unfounded.

> "(1) Martin's exercise of his suboption from Jett 'was conditioned on the ability to expand the plant to a processing capacity of 40,000 Mcf of gas per day' [Appendix A, p. 10];"

It is clear from the terms of Martin's suboption quoted at page 22 of Petitioner's brief that Martin would have been obligated to expand the capacity of the plant to 40,000 Mcf of gas per day as soon as Jett had performed his obligations under the contract. The Court did not state that expansion of the plant was a condition precedent to exercise of the suboption as Martin seems to argue. Clearly, Martin would have had to expand the plant had he exercised the option and had Jett performed his obligations under it. Prudent exercise of the option was therefore conditioned on the ability profitably to expand the plant in compliance with the commitment, and this is the gist of the Court's statement:

> "(2) that the reserves made it 'impossible' to expand the plant to a 40,000 Mcfd *capacity* [Appendix A, p. 10]; (3) that (i) 'a favorable reserve report by DeLaat' and (ii) a subordination by Jett of 'his net profits interest to the loan payments' were each

'a condition precedent to any financing' by Bank [Appendix A, pp. 4, 11];"

By these points (2) and (3), Petitioner seeks to imply that the only real matter of concern to the parties was having a plant of a *capacity* of 40,000 Mcf of gas per day even if the gas reserves would not supply the gas to be put through such plant. He ignores the economic presentation which had been made to the Bank and caused it to be interested (R. 1392), and he ignores the fact that mere existence of plant capacity does not provide income to repay investments. It is undisputed that the Bank's consideration of a loan was premised on DeLaat's reporting of reserves to support a throughput of 40,000 Mcfd of gas (R. 1222, 1392, Martin Deposition Exhibits DM 1A and DM 17).

"(4) that Bank had the right to give Phillips Martin's deal [Appendix A, pp. 5, 11];"

The court did not so hold, but merely stated that if this had been done by the Bank, it did not constitute a breach of the antitrust laws.

"(5) that Martin was not able to operate a gasoline plant [Appendix A, p. 9];"

Again, Petitioner is misquoting the Court of Appeals. The exact finding is ". . . we find that the Appellant by his own admission had no experience in the operation of a gas plant". Martin himself has so testified (R. 1220; Martin Deposition 79-80).

"(6) that Martin 'did not have the ability to finance the business' [Appendix A, p. 9];"

The finding attacked is that Martin "did not have the ability to finance the business, but was hoping to obtain

100% financing from the Bank." Petitioner's argument seems to be that Martin *did have* the ability to finance the acquisition because he ought to have been able to get the 100% financing from the Bank. This bootstrap rejoinder hardly establishes that the Court's finding was unfounded.

"(7) that 'Martin was a finder' [Appendix A, p. 11], which status the Court obviously concluded did not constitute 'property';"

The use of the term "finder" is clearly a convenience of expression. The essence of this observation is that mere proof that one who has spotted a business opportunity but is unable to conclude it on the terms he desires because of failure to obtain financing does not have property. This is a correct conclusion of law.

"(8) that the law of Louisiana prevented Martin's option from being valid [Appendix A, pp. 9, 11]."

As already demonstrated, under Louisiana law Martin's orally extended option was a nullity not only as to the parties but third persons as well. The statement of the Court of Appeals is entirely correct.

If in any sense Martin's orally extended suboption from Jett expiring on January 16, 1961, could be considered to be property, Martin was not injured in such property, for by Martin's own admission Mr. Jett, after the conclusion of the alleged conspiratorial acts and after Martin had voluntarily withdrawn from participation with the Respondents, extended Martin's sub-option to January 25, 1961.* Thus Martin wound up with a longer option period than he possessed at the time this Respondent first had any connection with the matter on January 12, 1961.

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* (R. 571. Item 41 of First Amended Complaint)

NO CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON MEANING OF "BUSINESS OR PROPERTY"

The decision of the Court of Appeals on "business or property" is consistent with the other Courts of Appeals decisions claimed by Petitioner Martin to be conflicting. In *Vines* v. *General Outdoor Advertising Co.*, 171 F. 2d 487 (2d Cir. 1948), the plaintiff had been in business as an advertising solicitor for seven years under contracts with the defendant. The defendant, pursuant to a contract with a competing advertising agency held to be violative of the antitrust laws, withdrew a customer which plaintiff had been soliciting and assigned such customer to the competing advertising agency. In *North Texas Producers Ass'n* v. *Young*, 308 F. 2d 235 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), the plaintiff was not only engaged in business as a Kansas milk distributor who proposed to extend his business into the Dallas, Texas, territory, but the plaintiff had a valid contract with the milk producers' association for a supply of milk which the competing milk distributors induced the producers' association to breach. In *Jerrold Electronics Corp.* v. *Wescoast Broadcasting Co.*, 341 F. 2d 653 (9th Cir.), *cert. denied*, 382 U.S. 817 (1965), the issue of whether the plaintiff had "business or property" was neither discussed nor decided. However, the opinion discloses that the plaintiff's majority stockholder had an operating community antenna television business in an adjoining area, that he chartered the plaintiff corporation to enter a like business in the area in question, that the new corporation solicited and signed up subscribers to its service, and that it placed orders with the defendant manufacturer for necessary equipment for the community antenna television system which were accepted by the defendant manufacturer. Defendant manufacturer thereafter un-

dermined, aborted, and averted performance under the purchase orders in conspiracy with plaintiff's competitor. The existence of both "business" and "property" in each of the three cases is readily apparent.

II.

THE JUDGMENT OF THE COURT OF APPEALS IS SUSTAINABLE ON THE FURTHER GROUND THAT THE PLEADINGS AND THE PROOF VIEWED IN THE LIGHT MOST FAVORABLE TO THE PETITIONER ESTABLISH AS A MATTER OF LAW THAT THIS IS NOT AN ANTITRUST CASE.

The only question reached and decided by the Court of Appeals was whether or not Petitioner had been "injured in his business or property." But even if Petitioner Martin had been so injured, the judgment of the Court of Appeals is correct because the pleadings and the undisputed facts, including every inference therefrom most favorable to the Petitioner, establish at the most an ordinary commercial venture by non-competitors to acquire a small natural gasoline plant with its gas gathering and pipeline facilities with the Respondent Phillips instead of the Petitioner Martin as plant operator and owner of a 50% residual interest. The Respondent Chemical Bank, which had made no binding or firm commitment to finance the acquisition of the Locust Ridge properties, decided that in order to make a sound loan it would be necessary to condition any such financing on Respondent Phillips participating as operator, marketer of plant liquids, and owner of a 50% residual interest, with Petitioner Martin's hoped-for interest to be reduced from a 43¾% residual interest to approximately 20%. Petitioner withdrew his oral suboption on the properties from further negotiations on January 16, 1961,

and sought to finance the acquisition elsewhere (R. 1147-52, 1155-59). Under a further oral extension of his suboption to January 25, 1961, Petitioner Martin thereafter sought to finance the acquisition of the properties from several other sources. When he was unsuccessful, and when the properties were thereafter acquired by Respondents, Petitioner brought this lawsuit. The district court found that "this record falls far short of showing a cause of action for violation of the antitrust laws" and the court of appeals similarly found "the remedy for this occurrence, if any, is not a suit under the antitrust laws". These holdings are not in conflict with but are supported by prior decisions of this Court and of the other Courts of Appeals.

In *Apex Hosiery Co.* v. *Leader* 310 U.S. 469 (1940), it was established that not every combination is within the scope of the Sherman Act but that its ambit is limited to combinations between competitors to fix prices or other terms and conditions of sale, to divide business, to allocate markets, or otherwise to limit or to eliminate competition between them; to combinations between sellers and buyers or sellers or buyers to refuse to buy from or to sell to competitors or to deal with others except on certain conditions; to combinations between manufacturers or other competitors to limit or otherwise restrict production of any commodity; and to other like combinations restraining free competition in the production, transportation, sale, or purchase of commodities in interstate commerce.

The Sherman Act does not bring within its scope a combination of non-competitors aimed at helping one member of the combine get a business deal that a non-member is also after. Under Petitioner's own theory, that is the most we have here. The pleading and the proof construed in the light most favorable to the Petitioner and every arguable inference therefrom raise at the most an issue of the exist-

ence of a combination between the Respondents to help the Respondent Phillips compete with Martin for the operation of and a 50% residual interest in the Locust Ridge gasoline plant and its attendant facilities. The Petitioner's theory boiled down to its essence is that the Respondents are liable in treble damages because Respondent Phillips competed successfully. As Judge Learned Hand put it in *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 430 (2d Cir. 1945):

> "The successful competitor, having been urged to compete, must not be turned upon when he wins."

Again in *Hunt* v. *Crumboch*, 325 U.S. 821 (1945), it was held that a conspiracy between a labor union and its adherents to boycott the plaintiff's business not for business or labor purposes but out of malice and revenge did not constitute an antitrust conspiracy. In affirming the dismissal of the case, this Court said with reference to the Sherman Act:

> "That act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."

While there is absolutely no evidence in this case of fraudulent, unethical, or improper conduct on the part of Respondents, the cases establish that even that kind of conduct by a combination which seeks to get a business deal for a defendant which the plaintiff is also after does not bring such a combination within the purview and application of the federal antitrust laws.

A recent decision which squarely supports the summary judgment in Respondents' favor in this case is *Ace Beer Distributors Inc.* v. *Kohn, Inc.*, 318 F. 2d 283 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963). In that case the defendant

Stroh Brewing Company was alleged to have conspired with the defendant Kohn, Inc., to cancel plaintiff Ace Beer Distributors, Inc., beer distribution franchise without prior notice and simultaneously to issue a new beer distribution franchise in the same territory to the defendant Kohn, Inc. It was charged that a part of the conspiracy was that Kohn, Inc., would secretly make preparations to make immediate entry into the beer distribution business in the two counties contained in the plaintiff's territory and secretly to lure two of plaintiff's key employees and nearly all of plaintiff's truck drivers into Kohn's employment immediately upon the cancellation of the plaintiff's franchise. It was charged that defendants knew that under such circumstances plaintiff would be unable to continue its business and that plaintiff's business as a beer distributor in interstate commerce would be and was substantially destroyed. It was held that the conspiracy charged was not the kind of combination that constituted a violation of the Sherman Act. The Court of Appeals stated in part:

> "In considering the issue in this case, it must be kept in mind that plaintiff is not seeking a recovery for an alleged breach of contract or damages based on any common law action for tortious interference with contract rights or for unfair competition or for any common law tort. Whether a right of damages exists in some other action based on breach of contract or tort, is not before us in this case. Whether a cause of action exists under the antitrust laws is the sole issue in this case. In that connection it is well settled that tortious conduct against one engaged in interstate commerce or which has an effect on interstate commerce does not automatically constitute a violation of the Sherman Act. Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311; Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464; Hunt v. Crumboch, 325 U.S. 821, 65 S. Ct. 1545, 89 L. Ed. 1954."

Another particularly persuasive decision is *Parmelee Transportation Co.* v. *Keeshin*, 292 F. 2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961), in which Keeshin was alleged to have conspired with a corporate defendant controlled by him and with a member of the Interstate Commerce Commission for the latter to use the influence of his official position to induce the railroad companies to award an exclusive contract for transfer service between terminals of the railroad companies to Keeshin's corporation instead of to plaintiff who had had this contract for many years. In return, the member of the Interstate Commerce Commission was to receive an executive position in the company and certain other emoluments from Keeshin. The combination was successful and Keeshin's company obtained the contract which otherwise appeared to be headed in the direction of Parmelee. The district court at the conclusion of the plaintiff's evidence dismissed the case, holding that the conspiracy was not an antitrust conspiracy and saying:

> "This case does not belong in the family of antitrust cases under any conditions from the entire record before me."

The Circuit Court of Appeals affirmed the trial court, saying:

> "An assertion that the competitive market for this contract was destroyed or that the competition for it was eliminated is belied by the record. While one competitor succeeded and necessarily the other failed, unmistakably there was very strenuous competition. This unavoidable fact undermines the plaintiff's charges under §§ 1 and 2 of the Sherman Act. Nor is this result precluded by the fact (which a court might well find on the case presented by way of offers of proof) that the victory of the successful bidder was made easier by the wrongful conduct of a public official. Assuming

the record represented as to his involvment reflects the truth (which we are for this purpose required to do), any party damaged thereby has (and would have had, even before the enactment of the Sherman Act) a ground for relief in the courts of this country. *However, the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit antitrust lawyer might use his skill in the use of words to convert many unlawful acts into antitrust violations. The antitrust laws were never meant to be a panacea for all wrongs.*" 292 F. 2d at 804 (Emphasis ours.)

The *Parmelee* case is a firm holding that a commercial combination to compete with another and to take a business deal away from another even through unethical or improper business conduct does not constitute a conspiracy in restraint of trade violative of the Sherman antitrust law even though interstate commerce is affected and even though the plaintiff competitor is injured.

The *Parmelee* decision was followed in *Norville* v. *Globe Oil & Refining Co.*, 303 F. 2d 281 (7th Cir. 1962), which held that a combination between a gasoline supplier and a filling station lessor, under which the lessor obtained the benefit of overcharges made by the supplier of gasoline sold to the plaintiff lessee, did not fall within the purview of the federal antitrust laws. The court said in part:

"Aside from the use of conventional antitrust language in describing the share of defendant Terzaikis in the transaction as a rebate, the claims advanced by plaintiff amount to over-reaching, imposition, and fraud in a business transaction. All this occurred in the State of Illinois, of which all the parties are citizens. Even if the products involved might have been in interstate commerce, the wrongs alleged are actionable under the

law of Illinois, which has jurisdiction over all the parties." 303 F. 2d at 282.

The Court in conclusion added:

> "It is, of course, immaterial that the appeal of treble damages and attorney's fees afforded by federal law may be more attractive than the simple compensatory damages available under state law." 303 F. 2d at 282.

The total — the ultimate — of Petitioner Martin's case, liberally viewed in the light most generous to him, is that Respondent Chemical Bank and Respondent Phillips, joined by other respondents, combined to take the contemplated Locust Ridge gasoline plant deal away from Petitioner and to acquire the plant and its attendant facilities with Respondent Phillips instead of the Petitioner as the operator and with Respondent Phillips instead of the Petitioner as the owner of the 50% residual interest and thereby placing Respondent Phillips in the position previously contemplated and intended for Petitioner Martin in the negotiations between the Respondent Chemical Bank and the Petitioner. The cases seem to establish beyond any doubt that this poses no antitrust issue — that this presents no combination or conspiracy violative of the Sherman Antitrust Act. If there is any actionable wrong involved, it is not remediable in an antitrust treble damage cause of action as the Petitioner evidently realized or suspected when he filed a common-law tort action in the state court shortly after Respondents answered his original Complaint in this case. The District Court opinion concluded that Petitioner,

> "with appetite whetted by visions of treble damages * * * has pursued this antitrust phantom, rather than the more substantial common law claim for interference with contractual negotiations. Counsel advise that such an action, filed contemporaneously with this, is pending in the state court. Plaintiff should look there for relief."

The claimed conflict between other Courts of Appeals decisions cited by Petitioner and this decision seems to be predicated entirely upon the fact that the cited cases held that the Sherman Act had been violated while this case held that it had not. The cited cases range all the way from common price fixing conspiracies to classic group boycotts with none of them bearing the remotest resemblance to the case at bar. For example, *United States* v. *First National Bank and Trust Co.*, 376 U.S. 665 (1964), involved the combination by merger of two banks which were substantial competitors. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), involved a price fixing agreement and *Associated Press* v. *United States*, 326 U.S. 1 (1944), involved a combination between competitors to boycott other competitors. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), was a classic group boycott in which the members of the New York Stock Exchange expressly agreed that they would not furnish the plaintiff leased wire services. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), was another classic group boycott where the competitor defendants expressly agreed that they would not sell appliances to Klor's. There was no agreement in the instant case, either express or implied, that anyone would refuse to sell to or buy from anybody. All of the other claimed conflicting decisions cited by Petitioner are equally remote and inapplicable.

NO UNLAWFUL TYING ARRANGEMENT

Petitioner argues that because the Bank set certain prerequisites for the financing of the Locust Ridge proposition these prerequisites must be considered as tied to the loan and therefore the Bank engaged in tying conduct in violation of Section I of the Sherman Act. Such argument will not bear analysis. The cases cited by Petitioner as conflicting with the decision of the Court below in failing to

find an unlawful tying arrangement as a matter of law, show that even if, as Petitioner contends, a loan of money by a Bank could be a "tying product",* and even if the services of Phillips as operator of the gasoline plant as a condition to making the loan could be a "tied product", there could be no tying arrangement which would violate Section 1 of the Sherman Act. Petitioner's quotation from *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958), states the requisites of unlawful tying arrangements. Such arrangements are unlawful "whenever a party has sufficient economic power with respect to the tying product appreciably to restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." Petitioner does not state what "commerce" has been affected. Of course, Petitioner is referring to an effect on commerce in LPG products from the plant. Petitioner's problem is that this is not the tied product about which he complains. Petitioner makes no claim that a not insubstantial amount of interstate commerce in services of Phillips as operator of the Locust Ridge Plant or any other similar properties has been affected, for to do so would be patently absurd.

As to the tying product, the credit of the Bank, it is clear that it was within the power of the Bank to grant or withhold such credit at will. Petitioner concedes that the Bank did not have monopoly power over credit generally. In fact, after Petitioner withdrew from any further negotiations with the Bank and other Respondents, Petitioner was free to and did seek financing elsewhere.

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* A loan of money in fact is *not* the sale or lease of a commodity as requisite for a tying arrangement under the antitrust laws. *United States* v. *Investors Diversified Services, Inc.*, 102 F. Supp. 645 (D. Minn. 1951); *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration Inc.*, 295 F. 2d 375 (7th Cir. 1961), cert. denied, 369 U.S. 812 (1962).

The requirement by the Bank that an experienced operator and marketer of the Locust Ridge Properties be obtained was proper, legitimate, and reasonable. It is obvious that the antitrust laws never contemplated that the conditions attached by a bank or any other lending institution to the lending of money or the extension of credit should be deemed an unlawful tying arrangement. The Bank was considering making a loan of $2,000,000. The money was to be repaid out of funds obtained from the operation of the Locust Ridge Plant. Therefore, the Bank had every proper, reasonable, and legitimate right to strengthen its security by insuring that there was a substantial and experienced operator of the properties and an assured market for the products of the plant. A law which would characterize the prerequisites that a lender sets for making a loan in a given situation as unlawful "tying" would be the most pernicious imaginable.

NO ATTEMPT OR CONSPIRACY TO MONOPOLIZE

Petitioner also asserts that the decision of the Court of Appeals is in conflict with decisions relating to attempts or conspiracies to monopolize in violation of Section 2 of the Sherman Act. But the elimination of the Petitioner as a would-be competitor in the Locust Ridge Market was not the result of an exercise of monopoly power by Phillips or the Bank or both of them combined. The undisputed facts are stated in the opinion of the trial court. Phillips was and is a minor factor in LPG Sales in the relevant market area selected by Petitioner. Even with the addition of the supply of liquids from the Locust Ridge plant, only 560 barrels per day, Phillips controlled only in the neighborhood of ten to fifteen percent of the market in that area. There are six or seven companies in the market which are larger marketers. The undisputed evidence is that

the market position of Phillips in this area had steadily declined in 1960 and 1961 until the local office of Phillips in Shreveport was closed because it was no longer economically justified. (R. 1085-1101). The uncontroverted evidence before the trial court showed that the average daily production of LPG Products from the Locust Ridge plant is less than 1% of the total production from similar plants in Louisiana. The total LPG products from the three plants controlled by Phillips in Louisiana amounted to 124,000 gallons per day including the Locust Ridge plant. There are fourteen other companies producing more LPG products per day in Louisiana plants than Phillips. One such company, the Union Texas Petroleum Company, produces almost ten times as much LPG as Phillips in Louisiana. (R. 583-605). Phillips has no natural gasoline plant at all in Mississippi. This evidence, which is from a 1963 survey of United States gas processing plants appearing in the *Oil & Gas Journal* and Bureau of Mines Information Circular 8006, entitled, Natural-Gasoline Plants In The United States, January 1, 1960, (R. 583-626) is uncontroverted and establishes as a matter of law that there is no monopoly, conspiracy to monopolize, or attempted monopoly in this case. Under this evidence, Phillips has neither the power to control market prices for LPG products in the market area nor to exclude competition therefrom.

The theory of attempt or conspiracy to monopolize urged by Petitioner is that in frustrating Petitioner's expectations and desires of becoming operator of the Locust Ridge plant and the owner of a 50% residual interest therein, Respondents excluded him from competition in the market area. Using this theory, in any competitive situation where two parties are competing for the same deal, the one who is successful in obtaining it and thereby excludes the competition of the other from that particular operation becomes a

monopolist as to that operation. This is the inevitable consequence of the competitive free enterprise system. There is a vast difference between competing successfully for a deal and the power to exclude another from the market. Monopolistic power is not merely to prevail in one competitive struggle but to deny to would-be competitors the opportunity to compete.

The decision of the trial court, as affirmed by the Court of Appeals, is in accord with *McKay* v. *Columbia Broadcasting System*, 324 F. 2d 762 (2d Cir. 1963), in which Columbia Broadcasting System and others were sued for antitrust damages because of an alleged conspiracy to obtain the production of and to produce a television program on the life of Billie Holiday, a famous jazz singer, which plaintiff also had been planning and seeking to do. It was alleged that the Defendants by such acts monopolized the production of this program and excluded the competition of the plaintiff. In affirming dismissal of this count of the suit, the Court of Appeals said:

> "Count I of the amended complaint attempts to state a Sherman Act claim by alleging a combination and conspiracy among CBS, four of its employees, and the New York State Department of Education to 'procure, monopolize, and keep within the control of the defendants . . . the production of a television program about Billie Holiday.'
>
> *"But simply characterizing the above facts by liberal use of antitrust terminology will not create a Sherman Act claim. Under the plaintiff's theory, which strikes us as nothing short of preposterous, anyone who claimed to be considering a future television program or movie about a particular person would have a claim against any producer of a program on the same subject under the Sherman Act for monopolization and suppression of competition in that subject.* We agree with Judge Levit that the amended com-

plaint does not set forth facts under which relief can be granted under the Sherman Act." 324 F. 2d at 763. (Emphasis supplied).

The decisions of the Courts below are also in accord with that in *American Football League* v. *National Football League*, 323 F. 2d 124 (4th Cir. 1963). In holding the fact that defendants held eleven of the most desirable locations out of thirty-one American cities suitable for professional football franchises did not constitute monopoly, conspiracy to monopolize, or attempted monopoly, even though Plaintiffs were excluded from these cities, the Court of Appeals said:

> "It is not unlike the choice a chain store makes when it selects a particular corner lot as the location of a new store. It preempts that lot when it acquires it for that purpose but, as long as there are other desirable locations for similar stores in a much broader area, it cannot be said to have monopolized the area, or, in a legal sense the lot or its immediate vicinity." 323 F. 2d 130.

Other cases of similar import are *Wright & Associates, Inc.* v. *Ullrich*, 328 F. 2d 474 (8th Cir. 1964), and *Clark Marine Corp.* v. *Cargill, Inc.*, 226 Supp. 103 (D. La. 1964).

The minor and declining position of Phillips in the market area and the trivial effect which the natural gasoline and LPG products volume from the Locust Ridge Plant had thereon demonstrates that no dangerous probability of Phillips' achieving a monopoly resulted from the Locust Ridge operation and that a subjective intent on Phillips' part to achieve a monopoly thereby would be an absurdity.

The decisions of the Courts below are not in conflict with *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459 (9th Cir. 1964),

cert. denied, 377 U.S. 993 (1964), nor with *National Wrestling Alliance* v. *Myers,* 325 F. 2d 768 (8th Cir. 1963). In *Lessig* the Court held that the probability of accomplishing a monopoly position and an investigation as to the power of the alleged monopolist in a relevant market were immaterial where the charge was only that an attempt to monopolize had been made and that the specific intent to monopolize existed. The Court simply held that the jury should have been allowed to determine whether or not Tidewater intended to fix the price at which "2,700 independent service station operators resold gasoline, and to exclude other suppliers of petroleum products and sponsored TBA items from competing for the patronage of these operators and took steps to accomplish that purpose", because based upon such findings, the jury could "properly conclude that Tidewater attempted to monopolize a part of interstate commerce . . . ." There is not one iota of evidence that Phillips alone or in combination with any other Respondents, sought to fix the price of any product or that Phillips alone or in combination with any other of the respondents sought to prevent an existing competitor from competing in any market.

In *Wrestling Alliance,* the Court was dealing with a proven boycott which in effect monopolized the wrestling exhibition business through combination or agreement between the allied and organized wrestling promotors which prevented the plaintiff from continuing in his existing business as a wrestling promotor and performer.

NO VIOLATION OF SECTION 7

Petitioner's procrustean effort continues with the assertion that the affirmance of the Court of Appeals of the trial court decision that Section 7 of the Clayton Act had

not been violated by the arrangements for the operation of the Locust Ridge plant by Phillips is in conflict with other decisions under Section 7. No such conflict exists because the undisputed facts show that even if the contractual arrangements between Phillips and other Respondents under which Phillips was to operate the plant properties and market the products thereof amount to an "acquisition" of assets, there was no potential lessening and no actual lessening of competition in the market area selected by Petitioner and, in fact, that competition was enhanced thereby. For the first time, Phillips was able to market LPG products in the Louisiana portion of the market area after the existing contract for the sale of LPG products had expired. Had Petitioner realized his hope of operating the Locust Ridge properties, he would have, by his own testimony, continued the existing contract with the Propane Corporation for the sale of plant products and there would have been no such addition of competition to the relevant market. (R. 1173, 1235). Propane Corporation has continued as a strong and vigorous competitor in the market. No competitor has been eliminated. It is also undisputed that there was vigorous competition in the relevant market before the "acquisition" and equally vigorous competition therein after the "acquisition". Phillips continued to decline in its position in the market and during this period at least two new competitors entered the field and increased their market percentages (R. 1098-1099).

Under circumstances such as those presented by this record, there is no cause of action under Section 7 of the Clayton Act for one standing in the position of Petitioner. No court has ever held, or even intimated, that a private individual with no existing business or property in any

way affected by an acquisition,* could recover treble damages as the result of a violation of Section 7, which requires as a quantum of proof a mere probable or potential anticompetitive effect.

III.

RESTRICTING PETITIONER'S ABUSE OF THE DISCOVERY PROCESS WAS NO ABUSE OF DISCRETION

Having been given free rein for more than two years to take more than 8000 pages of oral deposition testimony from more than 35 witnesses, including 10 employees of the Respondent Phillips, and having been permitted to obtain thousands of pages of documents and hundreds of pages of interrogatory answers from respondents, it is little short of astounding that Petitioner could now assert that he has been unduly restricted in his use of the discovery process. The District Court's opinion conservatively describes the discovery permitted Petitioner as "the most exhaustive discovery touching every phase of this controversy."

Some of the documents involved were the lawyer's notes of Respondent Phillips' tax attorney Baldwin taken in conference with McCullough and other employees of his client Phillips on January 13, 1961, and notes taken at the January 16, 1961, Adams Petroleum Center meeting in Houston in which they were in attendance. Another document involved is a memorandum which McCullough of

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* The property which Petitioner claims has been injured is his option on the Locust Ridge properties which, even if considered valid as orally extended, expired of its own terms on January 25, 1961, long before the contractual arrangements asserted to be an acquisition were consummated in the period March 27-29, 1961. Section 7 does not render unlawful negotiations antecedent to an acquisition.

Respondent Phillips wrote to his superior Keeler concerning the events at the Houston meeting of January 16, 1961, subsequent to the time that Petitioner Martin had withdrawn from the negotiations in hostility and at a time when this lawsuit was already imminent. The action of the trial court in quashing Petitioner's subpoena duces tecum for the production of these documents at the taking of the Baldwin deposition was patently correct for several reasons. First, the documents of a party must be obtained by a motion under Rule 34 with a showing of good cause and not by subpoena duces tecum under Rule 45 in connection with the taking of a deposition. Indeed Petitioner succeeded in quashing a subpoena duces tecum served upon him in connection with the taking of his oral deposition by Respondents on this very ground. (R. 307, 320). Second, the trial court also sustained Petitioner's objections and refused Respondents' motion to require the production of notes taken by the Petitioner's own lawyer, Ben H. Schleider, Jr., at the same January 16, 1961, Houston meeting and the narrative statements prepared by Petitioner Martin himself and by his associate Weiler concerning the very matters and transactions in suit. Having sucessfully resisted the production of his own notes and those of his associate and of his lawyer concerning these same meetings and these same matters, Petitioner is certainly in no position to complain about the refusal of the Court to compel the production of the identical type of notes and memoranda of Baldwin and McCullough concerning these same meetings and matters. (R. 474-488, 501-512, 535-538, 539-547, 557).

As to the other documents, a reference to the record shows that the trial court sustained the Respondent's objections for various reasons, all of which were valid. (R.

231-234, 253, 306). If Petitioner failed to obtain all of the documents to which he may have been entitled, this was due to his failure to pursue the proper procedures.

The courts have refused to disturb the exercise of the trial court's discretion in discovery matters comparable to this one. *Jones* v. *Metzger Dairies, Inc.*, 334 F. 2d 919 (5th Cir. 1964), *cert. denied*, 379 U.S. 965 (1965).

The recent case of *Waldron* v. *Cities Service Co.*, 361 F. 2d 671 (2d Cir., 1966), is quite comparable to the situation here. In affirming the summary judgment granted to the defendant in that treble damage action and in holding that the trial court did not abuse its discretion in denying further discovery, the Court of Appeals said in part:

> "* * * Despite these more than ample opportunities to develop a basis for his action, plaintiff has been unable to do so, and has failed to demonstrate the existence of any genuine issue of fact. The court quite properly denied the Rule 56(f) motion for further discovery by which plaintiff sought to engage in still another 'fishing expedition' in the hope that he could come up with some tenable cause of action.
>
> "We are not unmindful that private antitrust suits to some extent cast the plaintiff in the role of a 'private attorney general' and that such suits are favored. * * * Even so, it is apparent in this case that Waldron was given ample opportunity and scope in his shifting programs of discovery. The plaintiff, as a 'private attorney general' may not seek indefinitely, within the period of limitations, to use the process to find evidence in support of a mere 'hint' or 'suspicion' of a cause of action."

CONCLUSION

The reluctance of the courts to grant summary judgments in genuine antitrust cases, where the existence *vel*

son of a cause of action depends upon the resolution of material fact issues, does not obtain in actions based on claims which are beyond the scope and intendment of the antitrust laws, and which as a matter of law do not constitute the subject matter of an antitrust suit. *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962), relied upon by Petitioner, and cases following it, are of the former type. This case belongs to the latter classification. This Court has refused to disturb summary judgments for the defendants in antitrust treble damage actions in cases where it appeared as a matter of law that no such cause of action existed. *Poster Exchange, Inc.* v. *Paramount Film Distributing Corp.*, 340 F. 2d 320 (5th Cir.), *cert. denied*, 381 U.S. 936 (1965); *Jones* v. *Metzger Dairies, Inc.*, 334 F. 2d 919 (5th Cir. 1964), *cert. denied*, 379 U.S. 965 (1965). Summary judgments under such circumstances have been sustained by the Courts of Appeals in two recent treble damage cases. *Waldron* v. *Cities Service Co.*, 351 F. 2d 671 (2d Cir. 1966); and *Walker Disiributing Co., Inc.* v. *Lucky Lager Brewing Co.*, 362 F. 2d 1008 (9th Cir. 1966), application for cert. pending, Dkt. No. 626, October 4, 1966.

The present case may be neatly and accurately described by language from *Jones* v. *Metzger Dairies, Inc., supra*, as follows:

> "Our examination of the record and briefs, however, convinces us that the case was fairly and patiently considered by the Trial Court and that the correct result was reached. The learned and experienced Trial Court retained jurisdiction of the case for approximately three years, during which period of time there were conferences, pretrial procedures depositions, interrogatories, motions, answers, briefs, and other proceedings.

The docket entries alone require almost 19 pages of the record. We have found no error. The judgment is affirmed." 334 F. 2d at 926.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this Brief of Respondent Phillips Petroleum Company in opposition to Petition for Certiorari have been mailed, properly stamped and addressed, to Mr. A. A. White, Mr. Ben H. Schleider, Jr., and Mr. Earl O. Lattimer, II, attorneys for record for the petitioner Robert H. Martin, at their addresses of record, this 12th day of November, 1966.

.....

Attorney for Respondent
Phillips Petroleum Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ROBERT H. MARTIN,
Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS CHEMICAL BANK NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, AND TENSAS GAS GATHERING CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 15, 1966

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Petitioner seeks review of the decision of the Fifth Circuit affirming summary judgment for respondents and denial of petitioner's cross-motion for summary judgment. The petition should be denied.

The United States District Court for the Southern District of Texas, Houston Division (Ben C. Connally, Ch. J.), dismissed petitioner's complaint for treble damages after reviewing the extensive record including some 8,000 pages of testimony in 35 depositions taken by petitioner, thousands of pages of exhibits marked during those depo-

sitions, and the numerous answers of various respondents to petitioner's interrogatories. The District Court concluded that all relevant facts were before it, that there was no genuine dispute concerning any material fact, and that:

> "After the most exhaustive discovery touching every phase of this controversy, this record falls far short of showing a cause of action for violation of the antitrust laws. . . ." (R. 959)

The Court of Appeals likewise considered the extensive record and, on the basis of facts found to be undisputed or admitted by petitioner, held unanimously that petitioner by his own admissions does not have a claim under the federal antitrust laws.

The petition for writ of certiorari asks this Court to review all the facts in the case. Those facts show that petitioner was not "injured in his business or property" and therefore has no claim upon which relief may be granted under the federal antitrust laws. Hence it is the position of respondents Chemical Bank New York Trust Company ("the Bank"), Texas San Juan Oil Corporation ("Texas San Juan"), and Tensas Gas Gathering Corporation ("Tensas") that the decisions below were correct.

Question Presented

Should this Court review the undisputed and admitted facts on the basis of which the courts below held that petitioner was not "injured in his business or property" within the scope of the federal antitrust law?

Statutes Involved

In addition to the federal antitrust statutes set forth in the petition (pp. 4-6), the following provision of the

Louisiana Civil Code is referred to by both petitioner and respondents:

> "Art. 2440. All sales of immovable property shall be made by authentic act or under private signature.
>
> "Except as provided in article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

Facts

In October 1960 George Jett acquired an exclusive option to purchase from a family group in Shreveport, La. a gasoline plant owned by them and located at Locust Ridge, La. and a pipeline owned by Tensas which connected the plant with nearby gas wells in Louisiana and Mississippi (the plant and pipeline are hereinafter referred to collectively as "the Locust Ridge properties") (R. 950). Petitioner learned of Jett's option and petitioner and his associate, John Weiler, became interested in acquiring the Locust Ridge properties (R. 950). In November 1960 petitioner met H. C. Bailey, a Vice President of the Bank, and told Bailey about the availability of the Locust Ridge properties (R. 950, 1159). Bailey immediately expressed an interest in the properties as an investment for Texas San Juan, which was indebted to the Bank and which had a substantial tax loss carryforward (R. 950, 1160).

In December 1960 Bailey and a Bank geologist visited petitioner in Houston (R. 1161). There they reviewed a study of the gas reserves in the Locust Ridge area prepared earlier for Jett by geologist E. P. Ogier to support a proposed expansion of the Locust Ridge plant

(R. 1162). At that time petitioner and Bailey discussed a deal under which (1) the Bank would lend Texas San Juan the $2,000,000 needed to acquire the Locust Ridge properties pursuant to the Jett option plus whatever additional funds would be necessary to expand the plant and extend the pipeline, (2) petitioner would operate the enlarged plant, and (3) petitioner and Texas San Juan would each receive a 50% residual interest in the plant and pipeline after repayment of all loans (R. 951). Petitioner was requested to obtain an updated and expanded reserve report from Ogier and an economic feasibility study of the proposed plant expansion from Gasoline Plant Construction Corporation ("Gasoline Plant") (R. 1162).

On December 29, 1960, petitioner and Weiler secured from Jett a written, exclusive suboption for purchase of the Locust Ridge properties for $2,000,000 (R. 950). The suboption required payment of $200,000 to Jett by January 10, its expiration date (R. 951). It provided that Jett would receive a ⅛ overriding interest in net profits from the properties and that petitioner and Weiler would expand the plant from its then capacity of 25 MMcf (million cubic feet) of gas per day to make it "capable of processing" 40 MMcf per day (R. 1465).[1]

Early in January 1961 Weiler and petitioner returned to New York (R. 1165) and presented to the Bank the written suboption from Jett, a revised Ogier report and a Gasoline Plant report supporting the expense of expanding the plant (R. 951). The latter report was expressly:

> ". . . predicated on processing 40 MMSCFD of a composite plant inlet gas stream of the following analysis at a pressure of 700 pounds per square inch

[1]Petitioner seeks to minimize the importance of that requirement by urging a distinction between "capacity" and "throughput", but the undisputed facts are that his proposal to the Bank was based upon "throughput". See pp. 13-14, *infra*.

and a temperature of 100 degrees Fahrenheit." (R. 1474)

The Bank geologist gave petitioner and Weiler a written list of further documentation which would be required to support the proposed loan and close the deal.[2] It was also agreed that the Bank would hire Houston geologist Bart DeLaat to prepare an independent reserve report to support the loan (R. 1166-68). Finally, Bailey pointed out that the deal looked too thin to permit payment of the 1/8 override to Jett and made it a requirement that Martin contact Jett and obtain Jett's consent to subordinate his interest to repayment of all loans (R. 1178).

Although DeLaat was asked to proceed on a "crash" basis in view of petitioner's self-imposed time limitations under the suboption from Jett, it became apparent that there was no possibility of closing the loan by January 10 (R. 1177), and Martin was not prepared to advance any of his own funds even for a down-payment to Jett (R. 1220). At Martin's request, Bailey called Jett to assure him that the Bank was keenly interested in the deal and would make up its mind whether to go ahead and lend the first $200,000 by January 16, 1961 (R. 1180-82). Jett then gave Martin an oral extension of the written suboption to January 16 (R. 1135).

While DeLaat was pursuing his reserve study, he advised the Bank that Phillips Petroleum Company ("Phillips") controlled some of the gas reserves in the Locust Ridge area (R. 1431). On January 12, 1961, Bailey decided to contact Phillips, a customer of the Bank.[3] On Janu-

[2]The list, and petitioner's testimony concerning it, appear in Appendix A hereto.

[3]Bailey testified that he contacted Phillips to obtain information and advice (R. 1030-32). The District Court, in ruling upon the cross-motions for summary judgment, assumed without deciding that Bailey was acting in bad faith when he contacted Phillips (R. 953-54).

ary 13, G. W. McCullough, the Phillips officer having jurisdiction over gasoline plants, called Bailey back (R. 951). During the course of this conversation, Bailey inquired whether Phillips would be interested in participating in the transaction, and McCullough outlined the terms on which Phillips would be interested, which were that Phillips (1) would operate the plant, (2) would receive the brokerage fees for the sale of its products, and (3) would receive a 50% residual interest after payout of the loan. This proposal, obviously, would depose Martin as operator of the plant and necessarily reduce his residual interest well below 50%. Both parties to the conversation expressed an interest in pursuing the matter further, and a meeting on January 16, in Houston, was agreed upon (R. 952).

Bailey then advised Martin of the prospective entry of Phillips into the deal and of the planned January 16 meeting (R. 1152, 1197). Martin protested any participation by Phillips and, without telling Bailey, immediately began seeking financing from other sources (R. 1147-48).

On January 16 representatives of the Bank, Phillips, Gasoline Plant, and DeLaat met in Houston (R. 952). DeLaat presented his reserve report, in which he concluded that the reserves were insufficient to support the planned expansion of the plant to either a throughput or a capacity of 40 MMcf per day (R. 1051, 1405). Petitioner and Weiler were invited to join the meeting after lunch but were delayed in arriving because they decided to bring along petitioner's attorney, Ben H. Schleider, Jr., and Schleider was not immediately available (R. 1402-03, 1412).

When petitioner and his associates finally arrived, they were advised that the known gas reserves available were insufficient to support the project as proposed by petitioner, but that the quick study for which the group had time during the meeting suggested that a 25 MMcf throughput might

be attainable (R. 1210-11, 1404-05). It was agreed that all present would meet again the following day to pursue the matter further (R. 1217).

When petitioner and Weiler left the meeting late on January 16, they had yet not secured agreement from Jett to subordinate his ⅛ override (R. 879, 1227-28). Nor was there *any* evidence of sufficient gas reserves to support the plant expansion required under petitioner's suboption from Jett.[4] Finally, petitioner never produced any of the additional feasibility reports and preliminary contracts first required by the Bank on January 5, 1961, as a condition to its providing the financing (see Appendix A, pp. 6a-7a).

After the January 16 meeting broke up, petitioner and Weiler contacted Bailey in a Houston hotel and advised him that they were withdrawing their "loan application" (R. 1414-16). Petitioner secured a further oral extension of his suboption from Jett until January 25 (R. 952). Moreover, Jett unquestionably remained willing to deal with petitioner after that date.[5] However, petitioner's efforts to secure financing from other sources, which he had commenced on January 13, were unsuccessful (*ibid.*).

Jett then commenced to deal directly with Phillips, Phillips subsequently contacted Bailey, and eventually a revised transaction was arranged pursuant to which Texas San Juan became the owner and Phillips the operator of the

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[4]The revised Ogier report dated December 29, 1960, submitted by petitioner to the Bank, covered only undedicated (new) reserves, not dedicated (existing) reserves (R. 1481-96; see also R. 983-84, 1455). DeLaat did not disagree with Ogier's estimate of undedicated reserves (R. 1050-51, 1481-96). Ogier projected deliverability of 16.67 MMcf per day for the undedicated gas (R. 1482). The crucial question, the answer to which petitioner never supplied, was where the other 23.33 MMcf per day was coming from. The plant at that time was processing an average of 11 MMcf per day (R. 1499).

[5]Jett offered petitioner a suboption beyond January 25 for $10,000, but petitioner was unwilling to put up the money (R. 759, 1179).

plant (R. 952-53). Under the transaction as closed, Jett did not receive a 5/8 override on net profits from the plant and plant capacity was not expanded as required by petitioner's suboption from Jett (*compare* R. 1465-66 *with* R. 1535, 1560).

Argument

THE UNDISPUTED FACTS ESTABLISH THAT PETITIONER WAS NOT "INJURED IN HIS BUSINESS OR PROPERTY" BY ANY ACT OF RESPONDENTS.

A plaintiff in any private action brought under the federal antitrust laws must allege and prove that he has been "injured in his business or property." Clayton Act § 4, 38 Stat. 731 (1914), 15 U. S. C. § 15 (1964). Based upon his own admissions, the Fifth Circuit held that petitioner has not been injured in any business or property within the meaning of § 4.

Petitioner's principal attack on the holding below is simply an attempt to have this Court ignore the material facts found to be undisputed or admitted by petitioner (Pet., pp. 20-32).

Petitioner seems to have abandoned any contention that he has standing to sue based upon injury to any existing "business" conducted by him. Certainly the undisputed facts show petitioner could not have been injured in the business of owning or operating a gasoline plant and gathering system, for he admits that he has never owned or operated such a plant or system (R. 1220). The most that can possibly be contended for petitioner is that he had a hope or expectation of entering a new business.

Petitioner *hoped* by exercise of the limited suboption he held to acquire the Locust Ridge plant and gathering system and to expand both the gasoline plant and gathering system to a throughput of 40 MMcf of gas per day.

Since petitioner admittedly was not prepared to finance any portion of the proposed acquisition himself (*ibid.*), he *hoped* that the Bank would provide 100% of the capital required to pay both the $2,000,000 purchase price under the suboption and the cost of expansion required by the suboption. Although he implies that he had some sort of commitment from the Bank to provide such financing, he has never dared to allege that any firm agreement was reached. Rather, he has admitted that the alleged commitment was subject to a number of conditions. Before those conditions were met, and while negotiations were still in progress, petitioner voluntarily withdrew his proposal from the Bank. He failed to secure other financing and his suboption expired. Thus, at all times petitioner had at most only a *hope or expectation* of going into a business in which he had never before engaged and which would require complete financing by the Bank or someone else. The Fifth Circuit correctly concluded that petitioner was not "injured in his business" within the meaning of § 4 of the Clayton Act.

Petitioner now contends that both his negotiations with the Bank and his suboption from Jett achieved the status of "property" within § 4. Analysis of those contentions reveals that they too were properly rejected by the courts below.

Petitioner grasps at a slender reed indeed in contending that his negotiations with the Bank achieved the status of "property". The undisputed facts show that the negotiations had not progressed beyond the initial stage. Moreover, it is undisputed that the Bank had imposed several conditions as prerequisites to its financing the acquisition, and that petitioner made no attempt to satisfy those conditions.

Petitioner and his associate, Weiler, have admitted that their proposal to the Bank and their subsequent negotiations with the Bank were based upon a throughput of

40 MMcf per day (R. 1221-22, 1392-93). Understandably the Bank officers desired an independent appraisal of the potentials of the properties. It was therefore agreed that DeLaat would make such an appraisal so that the Bank would have independent assurance that this condition to the possible financing would be met (R. 1166-67). DeLaat estimated the undedicated reserves at 119.6 billion cubic feet and stated flatly that this reserve figure would never support expansion to 40 MMcf per day throughput (R. 1050-51). His estimate of reserves and statement of possible throughput have never been disputed.

It is hardly an answer to urge, as petitioner does (Pet., pp. 21-22), that his obligation under the suboption was a condition subsequent rather than a condition precedent. The plain fact is that the Bank was not going to lend the money required to purchase and expand the plant unless it was satisfied that the reserves were there to support the 40 MMcf throughput upon which petitioner's favorable economic projections were based.

Equally important are the other conditions which were imposed by the Bank as prerequisites to its providing the financing. Those conditions were set forth in a letter dated January 5, 1961, from the Bank geologist to Weiler (see Appendix A, pp. 6a-7a). Petitioner admits that he saw the letter and its attached list of conditions; hence he was quite aware that those conditions were also imposed by the Bank as prerequisites to its financing the transaction. Petitioner was required by the Bank to obtain: (1) an agreement by Jett to defer receiving any income under his 1/8 override until the proposed loans were repaid, which petitioner never obtained (R. 1228); (2) up-to-date deliverability reports from geologist Ogier, which petitioner never obtained (R. 1231); (3) gas analysis tests on all wells connected to the gasoline plant but not previously tested, which petitioner never obtained (R. 1232-33); (4) written turnkey con-

tracts for construction of the proposed expansion facilities, which petitioner never obtained (R. 1233-34); and (5) proof of contracts for the marketing of the liquid products from the gasoline plant, which petitioner never obtained (R. 1234-35).

It should be emphasized that all of the foregoing conditions were imposed by the Bank seven days before the inception of the "conspiracy" alleged by petitioner. The letter to Weiler setting forth the conditions is dated January 5, 1961; the Bank did not contact Phillips until January 12, 1961. Thus the undisputed facts, taken from petitioner's own testimony, make it clear that his uncompleted negotiations with the Bank did not achieve the status of "property" within § 4.

Petitioner also contends that his suboption from Jett constitutes "property" within § 4 and that respondents "injured" his suboption. But petitioner has no claim based upon the suboption because:

1. The suboption was void under Louisiana law after January 10, 1961.

2. The suboption was expressly conditioned upon an expansion of the plant which the undisputed facts show was not feasible.

3. In any event, there is no evidence—indeed no claim—that any respondent prevented or impeded him from obtaining financing elsewhere and exercising the suboption independently of the Bank and Phillips.

Applicable Louisiana state law destroys any argument that Martin's suboption achieved the status of property. His written suboption expired by its terms on January 10, 1961. (The first contact between the Bank and Phillips was on January 12, 1961.) After January 10, 1961, Martin held only an oral suboption on Louisiana real property and

immovables, and the Statute of Frauds provision in the Louisiana Civil Code declares such option to be null:

> "Art. 2440. All sales of immovable property shall be made by authentic act or under private signature.
>
> "Except as provided in article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

Hoth v. *Schmidt,* 220 La. 249, 56 So. 2d 412 (1951), holds that a promise or option to sell real estate is not valid unless given in writing, and that consequently an extension of the time stipulated in a written promise or option to buy or sell real estate must be in writing in order to be valid. And the Louisiana statute declares an oral contract for the sale of immovables to be null not only as to the parties of the contract, but to third persons as well. The Fifth Circuit correctly held that the Louisiana statute completely negates petitioner's standing to sue under § 4.

Assuming, however, that the oral suboption could have been enforced after January 10, 1961, petitoner also must show that he could have complied with the conditions of his suboption. As the Fifth Circuit pointed out, petitioner's suboption with Jett (R. 1465) required an expansion of the Locust Ridge gasoline plant from a capacity of 25 MMcf of gas per day to 40 MMcf and petitioner's proposal to the Bank was predicated upon a gas supply of 40 MMcf per day. Weiler testified as follows:

> "Q. It is true, is it not, Mr. Weiler, that both your agreement and that of the Plaintiff Martin and Southwest Gas Gathering Company with G. H. Jett, as well as all of your negotiations with the Chemical

Bank, were on the basis of a gas supply and a plant capacity of 40,000,000 cubic feet per day?

"A. Yes, sir." (R. 1392)

Thus the critical point is whether petitioner could have complied with this condition. All of the evidence—including petitioner's own[6]—shows that a 40 MMcf throughput could not be achieved, and the transaction actually consummated later did not include such plant expansion. Certainly the Bank was not going to advance the funds necessary for the required expansion of the plan to "be capable of processing 40,000 Mcf of gas per day" (R. 1465) until it was satisfied that there were proven reserves to support such expansion. Proof of reserves sufficient to support a throughput of 40 MMcf per day is therefore an essential part of petitioner's case, and both courts below found that there is no such proof.

Realizing that he could not have complied with the basic condition of his suboption, petitioner resorts to a strained analysis of the difference between "capacity" and "throughput" (Pet., p. 23). This is another attempt to have this Court ignore the undisputed facts pointed out by the courts below. Treating the language of the suboption as a maximum rather than a minimum requirement, petitioner argues that the 40 MMcf per day plant expansion upon which his deal was predicated really only required a 33 MMcf per day "throughput" and therefore that reserves to support a throughput of 40 MMcf per day were not required. The undisputed fact is that every projection of payout of the plant, every study of the deal as proposed by petitioner, was based upon a *throughput* of 40 MMcf per day (see R. 798-99, 1476). A sustained daily throughput yields income, while excess, unused capacity yields only additional cost. No

[6]See n. 4 at p. 7, *supra*.

amount of legalistic technical analysis in 1966 can obscure the undisputed fact that the parties in 1961 were concerned with how much money they could make from a 40 MMcf throughput and the further undisputed fact that the gas needed for that throughput was simply not there.

Finally, there is no showing that any of the respondents impeded petitioner's efforts to obtain financing from other sources. In other words, petitioner has not shown that he suffered any "injury" to the suboption from Jett. Petitioner was free at all times to seek other financing and in fact he did so commencing January 13 when it became apparent that he could not meet the conditions imposed by the Bank (R. 1147-48).

Petitioner repeatedly emphasizes that Jett was ready to honor the oral extension of the suboption, first to January 16 and then to January 25. Indeed, undisputed testimony shows that Jett remained willing to sell to petitioner even after January 25. Petitioner simply never could find the money. But it is not even alleged that respondents did anything whatsoever to prevent him from obtaining a loan elsewhere.

At the outset of this litigation Circuit Judge Hutcheson on July 16, 1962, denied respondents' preliminary motion to dismiss for failure to state a cause of action under the federal antitrust laws, but expressed his opinion that this was not an antitrust case (R. 124). That forecast has certainly been proven correct. From the extensive record thereafter compiled, Chief Judge Connally also concluded that petitioner has no claim for relief against respondents under the antitrust laws.

Affirming the District Court, a unanimous Fifth Circuit held that petitioner by his own testimony was unable to meet the basic requirement of § 4 that he be "injured in his business or property." Each judge who has considered this case has concluded that petitioner has not shown himself to have a claim under the federal antitrust laws.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

November 15, 1966

Respectfully submitted,

JOHN W. BARNUM,
Attorney for Respondents Chemical Bank New York Trust Company, Texas San Juan Oil Corporation, and Tensas Gas Gathering Corporation.
1 Chase Manhattan Plaza,
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DENMAN MOODY,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregong brief was served by me by mailing the same, with air mail postage prepaid, to Ben H. Schleider, Jr., Esq., appellant's attorney of record, at his address of record, on November 15, 1966.

JOHN W. BARNUM,
Attorney for Respondents Chemical Bank New York Trust Company, Texas San Juan Oil Corporation, and Tensas Gas Gathering Corporation.
1 Chase Manhattan Plaza;
New York, N. Y. 10005

APPENDIX A

Deposition of Robert H. Martin and exhibit thereto

MR. JEFFERS: All right. The first item listed in Category 33 in the No. 1 receipt for documents produced by your counsel is described as original letter—or letter dated January 5, 1961, from Chemical Bank to John L. Weiler, Southwest Gas Gathering Company, with list attached.

May I see that document, please, Counsel?

I would like to ask that the letter dated January 5, 1961, addressed to Mr. John Weiler, Southwest Gas Gathering Company, re Locust Ridge Plant, bearing no signature but being on the letterhead of Judson L. Anderson, Oil and Gas Department, Chemical Bank New York Trust Company, be marked for identification as DM-15, and that the attached list of seven items accompanying the letter be marked as DM-15-A.

(The instruments referred to were marked "DM-15" and "DM-15-A" for identification, copies of which are attached hereto).

Q. Mr. Martin, I show you the documents that have been marked DM-15 and DM-15-A and will ask you whether you recall having previously seen the letter marked DM-15 and the attached list marked DM-15-A?

A. What is your question?

Q. Whether you recall having previously seen the letter marked DM-15——

A. Yes, sir.

Q. —and the list marked DM-15-A.

Did Dr. Judson L. Anderson deliver this letter and list to Mr. Weiler at the Chemical Bank on January 5, 1961?

A. I think so.

Appendix A

Q. Paragraph 1 of the letter, paragraph numbered in parenthesis 1, calls for an up to date version of the report by C. M. Gribble of October 5, 1957. This revised report should be made by Mr. Ogier and should include an estimate of the reserves as of January 1, 1961, and a deliverability schedule of years from the three fields involved, namely, Rodney Field, Locust Ridge Field, North and South, and Lake St. John Field. Was that report called for by that paragraph ever furnished to the Chemical Bank?

A. I don't believe that work had been completed prior to Mr. DeLaat—or I don't know whether it was really ever started. But we had discussed this up there. And then, in effect, Mr. Ogier's work was ordered by Mr. Jett, not by us, and we passed it along to him. And in the meantime Mr. DeLaat was going to do some of the work in there. And then I don't recall any other report than the ones we were talking about this morning.

Q. The paragraph numbered 2 in that letter calls for gas analysis tests on all wells that have not previously been tested. These tests should be conducted in all field both new and old and from the reservoirs that are currently open to production and will be feeding into the plant. These analyses should indicate GPM of the gas for each test. Was that ever done?

A. We did not do it over.

Q. So that no additional analysis tests were made or caused to be made by you and furnished to the Chemical Bank after receipt of the letter of January 5, 1961?

A. As I recall, following this letter, when Mr. De Laat was employed that was one of the points that he covered in checking who had made the previous tests and going back and reviewing those records.

Q. But no new or additional gas analysis tests were made or caused to be made by you after receipt of the letter of January 5, 1961?

A. No, sir.

Q. On the attached list Item 1 is "Engineering Reports (Reserve and Deliverability)."

Two, "Well Tests of Fields and/or Wells For Liquid Content To Substantiate Liquid Ratio of Stream over Life of Property."

After receipt of the letter of January 5, 1961, were any additional engineering reports on reserves and deliverability made other than the reports subsequently made by Bart DeLaat?

A. I don't recall any.

Q. Were any well tests of fields and/or wells for liquid content to substantiate liquid ratio over stream over life of property incorporated in any engineering reports made subsequent to January 5, 1961?

A. No, not that I know of.

Q. Item 2 of the list of seven items is "Engineering and Feasibility Report on Gathering and Transmission Lines and Turn-key Contract for its Construction." Did the report subsequently received from Gasoline Plant Construction Corporation constitute an engineering and feasibility report on gathering and transmission lines?

A. Yes.

Q. But was there included or ever tendered to the Chemical Bank a turn-key contract for the construction of proposed new gathering and transmission lines?

A. We never yet have been asked to get that. That was the procedure that he was recommending to be followed as we progressed.

Q. Item 3 is "Engineering and Feasibility Report on Processing Plant and a Turn-key Contract on Construc-

tion of New Facilities; Performance Guaranty on Entire Plant Facilities." Again, did the Gasoline Plant Construction Corporation report constitute an engineering and feasibility report on the processing plant?

A. Yes.

Q. But again, there was never tendered, was there, any turn-key contract on the construction of new facilities or any performance guaranty on the entire plant facilities?

A. I previously stated that Gasoline Plant had told us and we had in turn given this information to the Bank that the figures they used in their reports were the figures that they would stand behind and take the contract on.

Q. But so far as there actually being tendered a turn-key contract or a performance guaranty in written form, that was never done, was it?

A. We weren't to that point yet.

Q. Item 7 on that list is "Contracts Covering the Sale of Plant Products for at Least Four Years at Prices in Accordance With Platz Oilgram and to be Taken at Rates Which Will Not Require More Than Five Days Storage." Were such contracts for the sale of plant products ever negotiated and tendered to—

A. There were already contracts in existence for the plant products which included any increase in products, and these copies had been made available to the bank.

Q. Were those contracts contracts for at least four years at prices in accordance with Platz Oilgram and to be taken at rates which will not require more than five days storage?

A. I don't think the contracts were complete in accordance with those words and that statement there, but there were contracts that were with big companies and we had every reason to think were satisfactory.

Q. Can you identify the contracts to which you are referring?

A. One contract was with Esso Standard, and the other one was with—I have forgotten the name of it now. But we had copies of the contracts at the time to show to the bank.

Q. Were they among the documents that were left with the bank?

A. Well, I would think so. I don't remember whether they were in there or not.

Q. Were there two such contracts, one with Esso Standard and then another one with another company whose name you can't now recall?

A. Yes.

Q. Do you remember at what point in the January 5 meeting at the Chemical Bank this letter was delivered and attachment was delivered to Mr. Weiler, referring to DM-15 and DM-15-A?

A. No, I don't remember what point. I think while we were there—Dr. Anderson was always present in these meetings, and before departing that day I think this letter was a result of him having studied over what reports were in there and that he set this up somewhat as an outline to follow.

Q. Was there any particular discussion of the letter or did he simply deliver the letter and attachment to Mr. Weiler as an outline of things to be done?

A. I don't remember any specific discussion of it. He might have had it while I was talking with Bailey and Zwick about something else.

Q. I believe you said that your visit to the Chemical Bank on January the 5th you thought was afternoon and that it was not a very long meeting.

A. The best I recall, that's right.

Appendix A

DM-15
J.M.

CHEMICAL BANK NEW YORK TRUST COMPANY
165 Broadway
New York 15, N. Y.

January 5, 1961

Oil and Gas Department
Judson L. Anderson

Mr. John Weiler
Southwest Gas Gathering Company

Re: Locust Ridge Plant Area

Dear Mr. Weiler:

With reference to the information which we consider essential to the adequate appraisal of the gas reserves and engineering we suggest that the following be supplied to us:

(1) An up-to-date version of the report by G. M. Gribble of October 5, 1957. This revised report should be made by Mr. Ogier and should include an estimate of the reserves as of January 1, 1961, and a deliverability schedule by years from the three fields involved, namely, Rodney Field; Locust Ridge Field (North and South); and Lake St. John Field.

(2) Gas analysis tests on all wells that have not presently been tested. These tests should be conducted in all fields both new and old, and from the reservoirs that are currently open to production and will be feeding into the plant. These analyses should indicate the GPM of the gas for each test.

Very truly yours,

JLA:IMS

Appendix A

DM-15A
J.M.

1. Engineering reports on (1) reserves and deliverability (2) well tests of fields and/or wells for liquid content to substantiate liquids ratio of stream over life of property.

2. Engineering and feasibility report on gathering and transmission lines, and turnkey contract for its construction.

3. Engineering and feasibility report on processing plant, and turnkey contract on construction of new facilities. Performance guaranty on entire plant facilities.

4. Contracts with producers for (1) in some cases the purchase of gas and (2) in some cases its transmission, and (3) in every case its processing.

5. Contracts with purchasers for (1) in some cases the sale of gas (2) and in some cases its transmission.

6. Contracts with producers for extraction of liquids.

7. Contracts covering the sale of plant products for at least four years at prices in accordance with Platts' Oilgram and to be taken at rates which will not require not more than five days' storage.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ROBERT H. MARTIN, *Petitioner*

v.

PHILLIPS PETROLEUM COMPANY, CHEMICAL BANK, NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., GAS INDUSTRIES MANAGEMENT CORPORATION and GASOLINE PLANT CONSTRUCTION CORPORATION, *Respondents*

NO. 690

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION BRIEFS

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PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION BRIEFS

I.

Present Posture of the Case

It cannot be seriously denied that Bank[1] and Phillips in combination and conspiracy successfully ousted Martin as a

[1] References to parties are in the same abbreviated form used in the Petition.

potential competitor of Phillips in the Locust Ridge area and deprived him of the value of his option to acquire the Locust Ridge plant and facilities. (Phillips Br. pp. 4, 22; Bank's Br. p. 6)

Nor does it appear that any of the Respondents could seriously challenge the requisite standing of Martin to maintain this action. They have impliedly admitted he had property. A release from Martin and his associate Weiler was later made one of the the two express conditions precedent to Bank, Phillips, Texas San Juan and Jett's going forward with the acquisition of the Locust Ridge properties without Martin.[2]

After Bank had surreptitiously combined with Phillips to replace Martin as operator of the Locust Ridge plant and marketer of its products, Martin's property was recognized in that he was conceded to be entitled to ½ of the remainder after Phillips had extracted its share, an interest such as would be given only to a person with a property interest. It is also admitted that Martin incurred expenses of $10,000 principally in obtaining feasibility studies.[3]

---

[2] "This agreement shall not be effective unless the following conditions have been met:

"(a) The Bank and Texas San Juan shall have received a written release from Messrs. Robert H. Martin and John L. Weiler relative to their prior involvement with the optioned property. By 3:00 P.M. March ____, 1961, Bank shall advise Phillips and Jett by telegram that this condition has been met or waived or the agreement is void and Phillips and Jett may proceed in any way they wish independently of the Bank and Texas San Juan." (R. 1521-1522)

[3] Hudson, president of respondent Texas San Juan, reported to Martin after leaving the Adams Petroleum Center meeting between Bank and Phillips that:

". . . Nick [Bailey of Bank] walked me out to the taxi cab and said, "Bill what do you think?" I said well if you want

Respondents make much ado about an advisory letter Judge Hutcheson wrote to District Judge Connally during the initial stages of this lawsuit. However, Respondents fail to reveal the total text of the letter (R. 124) in which Judge Hutcheson clearly recognized Martin's standing to sue and warned against the very action taken by both the District Court and the Court of Appeals.[4]

It thus appears that what respondents are challenging is how much business or property Martin had to be damaged as distinguished from whether or not he had the requisite standing to sue.

Each of the fact issues challenged by respondents is an attempt to show the frailty of Martin's interest. Hence, these fact issues bear on the issue of the extent of injury or damages to petitioner's business or property and not on whether Martin had the requisite status to maintain a lawsuit.

---

to do it Nick I'm with you and obviously in the light of what Phillips says it makes no sense at all for the Chemical to go ahead unless they do it with Phillips and he said "Well what is the division of the split?" and I said well, Phillips is going to want half it would strike me that whatever winds up that Texas San Juan should split with Bob Martin—just because—then there was a discussion that what have you contributed to this thing other than about 10 thousand bucks worth of reports this was at some point and they said what he really is, is a finder here, and I said well that isn't what he was in other words with our deal as a finder of the last half of the financing and in my estimation the tough half he was entitled to his 50-50 deal even though we knew he wasn't putting up any money he was nevertheless causing this financing to be arranged for which you earned your half . . ." (R. 1503)

[4] "What I am trying to emphasize is that since the statute created a statutory cause of action which was to be tried like any other cause of action, a court should not get caught in the position of putting himself in the jury box to the extent of determining the case on the pleadings." (R. 125)

This case was instituted as a jury case and petitioner believes that the unquestioned existence of the combination and conspiracy imposes liability as a matter of law on respondents, but the extent of monetary damage resulting from such liability must be factually determined before a trier of facts to ascertain the true worth and extent of the damage to Martin's business or property.

Petitioner has amply demonstrated that there are substantial issues of fact bearing on the injury or damage to Martin's business or property. (Martin's Pet. pp. 20-27) Respondents' briefs support or fortify the existence of such fact issues. (Bank's Br. pp. 5-13; Phillips' Br. pp. 12-14)

II.

"Business or Property"

It is apparent from the foregoing that there are fact issues on the extent of damage to Martin's "business or property." It is also Martin's position that there are sufficient established facts to show as a matter of law that Martin had "business and property" (Martin's Pet. pp. 29-32) which was injured by antitrust violations of respondents (Ibid. 32-41), and that the contrary holdings below are in conflict with decisions of this Court and of other Courts of Appeal as set out in Martin's Petition for Writ of Certiorari (Ibid. 29-41).

Bank's brief argues only the merits of "business or property" and addresses itself not at all to the specific "business or property" grounds urged by Petitioner (Martin's Pet. pp. 28-32) for granting the Writ. The only opposition to those grounds are the limited efforts of Phillips (Phillips' Br. p. 15) to answer only one of the two grounds urged by Martin.

The "business or property" phase of the case might be rested with the Fifth Circuit's recognition that Martin had a "find" which Bank "gave" to Phillips (Martin's Pet., App. A, p. 11), and with Phillips' recognition that Martin had with Bank "a promising business relationship" (Phillips' Br. p. 10). A "find" in this context which Bank "gave" can mean nothing but "property." And "a promising business relationship" is the most Vines had in *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (C.A. 2, 1948), and the most that Wescoast had in *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.*, 341 F.2d 653 (C.A. 9, 1965), *cert. den.* 352 U.S. 817 (1965) at the time of the tying violation, and both plaintiffs were found to have property.

But Bank and Phillips are otherwise demonstrably wrong on this as well as other issues. Both respondents say Martin had no business which was injured. This is said despite the unchallenged fact that Martin was in the oil and gas business producing, transporting and marketing gas and doing first stage processing thereof (R. 869-870).[5] He was seeking to make a natural expansion of that business to acquire a small gas processing plant. Respondents would make it appear he was seeking to embark on a strange, new venture. (Phillips' Br. pp. 6-7; Bank's Br. p. 8) Thus respondents, to defeat Martin, would fragment the oil and gas industry into many unbridgable parts. This represents a drastic about face on the part of respondents. The tax loss carry forward

---

[5] Records from Bank's unilateral investigation into Martin's background revealed:

> "2—Mr. Martin is evidently highly respected by the major oil companies in this area and is on their so-called 'favored' list. Because of this he is able to get advantageous farm-outs. He has been most active with Tennessee Gas.
>
> "3—I believe that he is technically a very excellent operator.
>
> "We are, of course, very interested in anything which can be done with Texas San Juan and from what we know in this firm I would say he would be a very suitable partner for us." (Zwick Deposition Exhibit PZ-62.1)

which was the "key" to the acquisition of the Locust Ridge properties was based on a loss in off-shore drilling (R. 1001, 1007) and Phillips and Bank are absorbing it in gasoline plant operations. (R. 637, 950, 1000, 1033, 1034, 1108, 1122, 1248, 1358) Under Section 382, Internal Revenue Code 1954, the revenues produced at the gasoline plant could be used to utilize the tax loss incurred in off-shore drilling only if the two are "substantially the same" business.

Martin had a business (R. 869-870) and respondents choked off its normal expansion. Martin had the intention; he had made and was making the preparations; he had the ability to finance the expansion by exchanging a ½ interest in his option property for 100% financing (R. 951, 1221)[6] and Martin could operate the property (R. 702-705, 869-870). No more is required.

Respondents make determined efforts in their briefs to show that Martin had no property. But Martin had a many-faceted property (R. 1221). First there was his business (R. 869-870). Next was his recognized "promising business relationship" with Bank (Phillips' Br. p. 10). Such a "relationship" is property, wrongful interference with which is actionable.[7] Next was his contract and promising

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[6] The acquisition was ultimately financed in exactly this manner, Phillips investing no capital.

[7] **International News Service v. Associated Press**, 248 U.S. 215 (1918); **Bender v. Hearst Corporation**, 263 F.2d 360 (C.A. 2, 1959); **Kansas City, M. & O. R. Co. of Texas v. Bell**, 197 S.W. 322 (Tex. Civ.App. 1917); **Graham v. St. Charles St. R. Co.**, 116 So. 806 (La. 1895). "It should be of no importance to the third party by what happenstance the relation came into existence so long as it is one recognized by law. The relation is more vital and durable than the contract itself and may have protection against a third party beyond the terms of the contract. Thus, even if a contract is unenforceable between the parties because it is a contract at will or because it violates the statute of frauds, a valid relation against third party interference may be established." Green, **Trade Relations under Tort Law**, 47 Va. Law Rev. 559, 563 (1961).

business relationship with Jett. The heart of respondents' attack on Martin's contract and business relationships as property is that all of it was fatally conditional. Their argument on "conditions" will not stand analysis.

It first should be noted that neither respondent has cited one instance where any Bank officer or other employee testified that any specific thing was ever made a condition to Bank's financing the acquisition of the Locust Ridge properties. There are no such references to be cited.

Heavy last-ditch reliance is now placed on Exhibits DM-15 and DM-15A (Bank's Br., App. A, pp. 6a, 7a). Neither respondent thought enough of this strange document intially to have it printed in the record. Respondents' counsel are too numerous and too astute for that to have been an oversight. But the reasons for their not doing so are obvious.

1. This is a document which Martin "think(s)" was delivered by Dr. Judson L. Anderson of Bank to his associate Weiler (Bank's Br., App. A, p. 1a).

2. The document is not signed. If the dictation initials JLA mean Dr. Judson L. Anderson of Bank, he was a technical employee without managerial or official status (R. 980-981). And when Martin sought answers to interrogatories from Bank when Bailey was on leave, Bank stated under oath that "Bailey was *solely* in charge of this matter up to January 16, 1961 . . ." (R. 130). [Emphasis supplied]

3. The claimed "conditions" are not even all on the face of the unsigned document, but apparently there was an unsigned "attached list" (Bank's Br., App. A, p. 3a) to which no reference was made on the face of the unsigned letter. It is impossible to tell whether the introductory paragraph on DM-15 extends to DM-15A. The relationship between the two exhibits is obscure.

4. If the document had been integrated, regular in form and authoritatively signed, it would not have imposed "conditions" simply because its tenor was to "suggest" (Bank's Br., App. A, p. 6a).

5. DM-15 and especially DM-15A show on their faces why no responsible Bank official would have made, under the circumstances, their contents conditions. See especially the contract provisions of items 2-7 of DM-15A.

The simple facts are that negotiations without formulated conditions were being worked out on all fronts looking to a meeting in Houston between Bank and Martin before the option expired to determine whether the option would be exercised (R. 951; Martin's Pet., App. B, pp. 2-3). It was only after Martin on Friday, January 13, 1961, protested strongly Bank's actions in unilaterally bringing in Phillips that Bank and Phillips found it necessary to construct a "condition" with which to "murder" Martin's deal (R. 1502). And it was only after respondent Bank's counsel got in desperate need of some "conditions" on which to defeat Martin's "property" that DM-15 and DM-15A were brought out of the obscurity to which their lack of merit had relegated them.

This conclusion is borne out by many phases of the record. Bank's letter of December 19, 1960 (R. 1456) wherein "Nick" speaks to "Bob" of "our joint enterprises" suggests a cooperative approach to the working out of something of mutual interest, rather than of the more formal approach of "conditions." There appeared to be no concern about unfulfilled conditions when Bailey reported on January 10, 1961, that everything was progressing nicely and that he saw no reason why the option would not be exercised (R. 951; Martin's Pet., App. B, p. 3). It is also obvious from Martin's shocked reaction to Bank's 11th-hour

injection of Phillips into the acquisition that he was not aware of any defeating conditions (R. 1038-1040). Similarly, failure to meet conditions does not appear in any version of the conversation that broke off relations between Martin and Bank (R. 1045-1046, 1413-1416). The record discloses that such problems as there were about Jett's 1/8 override (R. 1177-1178) and expansion of the plant to a *capacity* of 40,000 mcfd (Martin's Pet. pp. 22-23) would have been worked out. There is no evidence to the contrary. Neither Bank nor Phillips is in a position to complain of lack of finalized perfection, if any, when their own disruptive actions diverted and threw turmoil into the last three days before Martin's exclusive option expired. *North Texas Producers' Association v. Young*, 368 F.2d 235, 245 (C.A. 5, 1962), *cert. den.* 372 U.S. 929 (1963).

Absent these phantom "conditions," it is clear that Martin had business and property and that the decision of the Fifth Circuit holding to the contrary is in conflict with decisions of other courts of appeal (Martin's Pet. pp. 29-32).

Respondents, as did the courts below, continue in evaluating Martin's option as property, to ignore the cases of *Strawbridge v. Warfield*, 4 La. 20 (1832); *Packwood v. White*, 7 La. Ann. 31 (New Orleans 1852), and *Pauline v. Hubert*, 14 La. Ann. 161 (New Orleans 1859) which hold that otherwise valid contracts under Article 2440 of the Louisiana Civil Code are enforceable, though oral, if the parties do not object. The record is undisputed that both Jett and Martin honored the oral suboption in question. So if Louisiana law was controlling, which it is not (see *Leh v. General Petroleum Corporation*, 165 F. Supp. 933 (S.D. Cal. 1958); *Cinnamon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833 (E.D. Mich. 1963); *Winckler-Koch Engi-*

neering Co. v. Universal Oil Prod. Co., 100 F. Supp. 15 (S.D.N.Y. 1951); *Taxin v. Food Fair Stores, Inc.*, 181 F. Supp. 181 (E.D. Pa. 1960), aff'd 287 F.2d 448 (C.A. 3, 1961)), it would be no bar to Martin's having property in his option.

III.

Antitrust Violations

A. On Combination in Restraint of Trade (Phillips' Br. pp. 16-23)

Phillips relies on some non-analogous labor cases [*Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) and *Hunt v. Crumboch*, 325 U.S. 821 (1945)]; some non-analogous substitution of franchise cases [*Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (C.A. 6), *cert. den.* 375 U.S. 922 (1963); and *Parmelee Transportation Co. v. Keeshin*, 292 F.2d 794 (C.A. 7), *cert. den.* 368 U.S. 944 (1961)]; and a non-analogous political activity case [*Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)] to establish the non-sequitur that the combination of non-competitors to thwart entry into the commercial market by a competitor (Martin) of one of the combiners (Phillips) was not a violation of the antitrust laws. The position is untenable on its face, and is refuted by *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*, 365 U.S. 656 (1961), where it was held that a combination containing non-competing persons could violate the antitrust laws.

B. On Unlawful Tying (Phillips' Br. pp. 23-25)

The fundamental error here is that Phillips does not distinguish between Bank's imposing, as a condition of making a loan, that Martin obtain an operator and marketer

of certain qualifications and experience, which it could have lawfully done, and in Bank's unilaterally making an agreement with Phillips to operate the plant, market its products and take part of Martin's residual interest and then telling Martin if he got the loan he would have to take these burdensome services. The difference is the difference between a lawful condition and an unlawful tying arrangement.

Phillips is gravely inaccurate in its footnote reference at the bottom of page 24 of its brief. The cited cases do not hold that the loan of money cannot be the tying element in an unlawful tying arrangement under the "antitrust laws." The cases so held only with respect to tying arrangements under Section 3 of the Clayton Act, 15 U.S.C. Sec. 14, because of the unique statutory language in that Section. Our case is under Section 1 of the Sherman Act. (Martin's Pet. pp. 36-37).

C. *On Attempt or Conspiracy to Monopolize (Phillips' Br. 25-29)*

Phillips here ignores the unchallenged fact findings of the trial court on attempt to monopolize (R. 951; Martin's Pet., App. B, p. 3). Phillips is also in error in its unsupported statement that there were six or seven companies (Phillips' Br. p. 25) in the relevant market larger than Phillips (see facts and record references, Martin's Pet., pp. 16-17). Based on the trial court's unchallenged finding, and the record-supported facts, the holding of the lower court on the law issue was clearly in conflict with *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (C.A. 9, 1964), *cert. den.* 377 U.S. 993 (1964). It appears Tidewater sold only about 5% of the gasoline in its marketing area (327 F.2d at p. 468).

D. *On Section 7 Clayton Act Violation (Phillips' Br. pp. 29-31)*

Phillips here continues its approach, actually the only one available to it, of ignoring the facts and the cases set out in Martin's Petition. Phillips makes no attempt to show that the holding of the court below, that Phillips' acquisition did not violate Section 7, was not in conflict with decisions of this court holding that acquisitions in markets less concentrated than the one in question did violate Section 7 as a matter of law (Martin's Pet. pp. 39-40).

IV.

Abuse of Discretion on Discovery (Phillips' Br. pp. 31-33)

Much is made by respondents of the amount of discovery had. Deposition discovery was no doubt lengthened by trying to develop peripherally, with witnesses having failing memories, what probably was disclosed by a few vital documents made at the time of the events they describe and dealing with the heart of respondents' activities. Futile attempts were made by Martin to have such documents produced before the taking of depositions (see record references Martin's Pet., p. 40). Martin believes that the facts eventually obtained entitle him to judgment as a matter of law on the issue of liability, but if the case is to be tried on that issue, or, if not, still on the issue of damages, good cause for production of the documents is obvious.

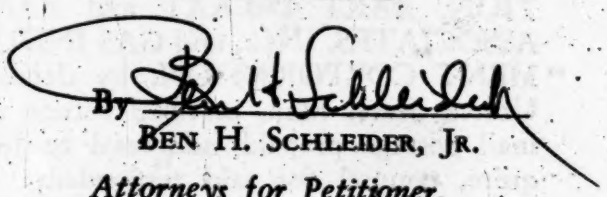
Conclusion

It is clear from Martin's Petition and Respondents' briefs that there are fact issues but that they go only to the damage to Martin's business and property. It is believed to be clear that there is a core of undisputed facts which show as a matter of law that Martin had both business and property; that respondents injured them by combined actions in violation of the antitrust laws; and that the holdings to the contrary below are in conflict with numerous decisions of other courts of appeal and of this court.

Martin, therefore, prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

A. A. WHITE
BEN H. SCHLEIDER, JR.
EARL O. LATIMER II

By 
BEN H. SCHLEIDER, JR.

Attorneys for Petitioner,
Robert H. Martin

Certificate of Service

I, BEN H. SCHLEIDER, JR., one of the attorneys for ROBERT H. MARTIN, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of November, 1966, I served copies of PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION BRIEFS in the above entitled cause on the several parties thereto, as follows:

1. On respondents PHILLIPS PETROLEUM COMPANY and GASOLINE PLANT CONSTRUCTION CORPORATION, by depositing five (5) copies in the United States Mail, certified return receipt requested, postage prepaid, addressed to Messrs. Leroy Jeffers, Ross N. Sterling, Richard P. Keeton and Harry M. Reasoner, counsel for said respondents, of the law firm of Vinson, Elkins, Weems and Searls, First City National Bank Building, Houston, Texas 77002.

2. On respondents CHEMICAL BANK NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., and GAS INDUSTRIES MANAGEMENT CORPORATION, by depositing a copy in the United States Mail, certified return receipt requested, air mail postage prepaid, addressed to John W. Barnum, Esquire, counsel for said respondents, of the law firm of Cravath, Swaine & Moore, 1 Chase Manhattan Plaza, New York, New York 10005.

DATED: At Houston, Texas, November 22, 1966.

Ben H. Schleider

BEN H. SCHLEIDER, JR.

Attorney for Petitioner,
Robert H. Martin

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ROBERT H. MARTIN, *Petitioner*

v.

PHILLIPS PETROLEUM COMPANY, CHEMICAL BANK, NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., GAS INDUSTRIES MANAGEMENT CORPORATION and GASOLINE PLANT CONSTRUCTION CORPORATION,
Respondents

NO. 690

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Of Counsel:
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IN THE

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OCTOBER TERM, 1966

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PHILLIPS PETROLEUM COMPANY, CHEMICAL BANK, NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., GAS INDUSTRIES MANAGEMENT CORPORATION and GASOLINE PLANT CONSTRUCTION CORPORATION,
Respondents

NO. 690

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

"The petition for a writ of certiorari is denied. The Chief Justice would grant the petition and reverse the judgments of the lower courts. **Klor's, Inc. v. Broadway-Hale Stores, Inc.**, 359 U.S. 207 and **Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.**, 364 U.S. 656."

Martin v. Phillips Petroleum Co., Et Al.
Supreme Court of the United States,
No. 690, October Term, 1966,
December 12, 1966

During the six-year history of this case petitioner has never been permitted to present his case to the trier of the facts—the jury. (App. B, Martin's Petition). It is common knowledge that antitrust litigation is one of the most prolonged and expensive areas of litigation and that it is especially onerous and burdensome upon the private plaintiff. Therefore, the private plaintiff, such as petitioner, considers very carefully the United States Supreme Court cases covering his area of litigation. Petitioner at the inception of this litigation studied very carefully the cases and believing in the certainty of the pronouncements set forth in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) and *Poller v. Columbia Broadcasting Co., Inc.*, 368 U.S. 464 (1962), which belief was affirmed by at least one member of this Court in its order of December 12, 1966, decided to pursue this litigation which has resulted in a crushingly expensive and time-consuming experience for plaintiff. And yet, at this time, six years after the whole experience began, petitioner has not been allowed to present his story to the jury.

When in our highest court there is as much conflict and uncertainty as to the strength and worth of Martin's claim, as was demonstrated in this Court's order of December 12, 1966, can it be said that a jury of reasonable men could not say that petitioner was injured in his business or property by a combination and conspiracy of respondents? This Court's procedure of issuing *per curiam* opinions could, in the least time consuming way for this Court, allow petitioner to present his case to the jury.

Not to give petitioner that opportunity, after he has undergone all these years of expense and time, believing in good faith that he has an antitrust action, seems contrary to the policy of Congress toward such private anti-

trust litigants as demonstrated in Section 5 of the Clayton Act (15 U.S.C. § 16). And not to do so will have a very negative effect on private antitrust litigation as well as jarring the certainty thought to exist under *Klor's, Radiant Burners* and *Poller*, supra. The national importance of this result is striking. With the number of criminal and civil antitrust cases commenced by the government having decreased to its lowest number in eight years in 1964,[1] only the private antitrust plaintiff can fill the gaps. Yet, if a plaintiff, with the very substantial basis held by petitioner, must undergo the onerous burden of time and expense, and still never get to the jury, as in this case, what private antitrust litigant, except in the very clearest of cases, will have the courage or desire to help carry out the intent of Congress under our antitrust laws?

Intervening Circumstances of Substantial or Controlling Effect

1. Petitioner filed his petition for certiorari on October 17, 1966. Thereafter this Court denied certiorari on November 7, 1966, in the case of *South Carolina Council of Milk Producers, Inc., et al. v. Newton, et al.*, which came to the Court from the Fourth Circuit.

There the district court granted a motion for summary judgment urged by defendants, wholesale and retail grocers, ". . . because of 'lack of privity of contract, direct relationship or mutual competition' between the (plaintiff) milk producers and the defendants . . ." concluding the milk producers were not persons injured "by reason of anything forbidden in the antitrust laws" under Section 4 of the Clayton Act.

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1. 1965 Administrative Office of the United States Courts Director's Ann. Rep. 119.

The summary judgment rendered by the district court was reversed by the Fourth Circuit because the plaintiffs did have standing to sue and this court denied certiorari. The court of appeals at 360 F.2d 417 acknowledged:

> "* * * That the plaintiffs did not directly sell to the defendants, the defendants were not producers in competition with the plaintiffs, and the plaintiffs' commodity was raw milk while the defendants' commodity was processed milk. The conclusion (of the district court) was that in these circumstances no 'privity of contract, direct relationship or mutual competition' existed between the plaintiffs and the defendants, hence there was 'no directness of injury' without which no antitrust cause of action arose, regardless of the illegality of the alleged combination, conspiracy or attempted monopolization."

But the Court of Appeals then concluded:

> "This application of the Federal statutes is, in our judgment, too narrow. The Clayton Act, § 4, 15 U.S.C. § 15, gives relief by way of damages to '*any* person who shall be injured in his business * * * by reason of anything forbidden in the antitrust laws.' Section 4 does not in its terms limit relief to persons in a direct contractual or competitive status with persons whose conduct allegedly violates the proscriptions of the Sherman Act. (Emphasis supplied)
>
> * * * *
>
> "A kindred point urged by the defendants, as noted previously, is that there was no cause of action because there was no contract between the plaintiffs and the defendants, i.e. the plaintiff is not selling to the defendants. The answer is that the cause of action is not dependent upon a relationship, contractual or otherwise, between the claimant and the offender, so long as the injury is a proximate result of the misdoing." (p. 419)

Three days later, on November 10, 1966, the Eighth Circuit affirmed a judgment in favor of treble damage plaintiffs relying in part on the authority of *South Carolina Council of Milk Producers, Inc.* and upheld the standing of plaintiffs to sue. *Sanitary Milk Producers, et al v. Bergjans Farm Dairy, Inc., et al* (C.A. 8th, 1966), CCH Trade Cases, Par. 71,922; ____F.2d____.

These new cases are directly in conflict with the holding of the Fifth Circuit in this case (App. A, Martin's Petition) and are in direct support of petitioner's contentions at pages 29-32 of Martin's Petition.

2. On October 17, 1966, the date petitioner filed for certiorari, this Court granted certiorari in No. 342, *Federal Trade Commission v. The Proctor & Gamble Company*, a Clayton Act § 7 case. Facets of that case bear substantially on the effect of an acquisition—in that case a conglomerate merger—by a competitor in an oligopolistic market imposing a substantial threat to entry into the market by outsiders. The instant case of *Martin v. Phillips* involves in a direct and recurring sense the problem of market entry, a major problem of national scope and importance. This Court is urged to grant the writ here sought and hear argument on both cases at the same time. Argument on both cases would give this Court greater perspective on the market entry problem. *Proctor & Gamble* involves the impediments to entry into the market resulting from a conglomerate merger involving companies of national scope, a problem meriting the attention of the government, while *Martin v. Phillips* involves the blocking of entry into a small but oligopolistic local market by curry-favoring action between a major oil company and one of the country's largest banks. This small case may not readily affect the

national market, but as this Court said in *Klor's, Inc. v. Broadway-Hale Stores, Inc., et al,* 359 U.S. 207 (1959) at p. 213:

> "* * * (I)t is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups."

CONCLUSION

Petitioner respectfuly submits that he has carried the burden and shown good cause for granting a Writ of Certiorari and that in light of the conflict and uncertainty shown in this Court's Order of December 12, 1966, this Court should at bare minimum reverse and remand this cause *per curiam* as it did in *United States v. Continental Oil Co.,* 377 U.S. 161 (1964), so as to afford petitioner a trial by jury.

Respectfully submitted,

A. A. WHITE
BEN H. SCHLEIDER, JR.
EARL O. LATIMER II

By_____
Ben H. Schleider, Jr.

Attorneys for Petitioner,
ROBERT H. MARTIN

RULE 58 CERTIFICATE AND CERTIFICATE OF SERVICE

I, BEN H. SCHLEIDER, JR., one of the attorneys for ROBERT H. MARTIN, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that this petition for rehearing is presented in good faith and not for delay and that the grounds urged herein are confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioner although not previously presented.

I further certify that on the ____ day of January, 1967, I served copies of PETITION FOR REHEARING OF ORDER DENYING CERTIORARI in the above entitled cause on the several parties thereto, as follows:

1. On respondents PHILLIPS PETROLEUM COMPANY and GASOLINE PLANT CONSTRUCTION CORPORATION, by depositing five (5) copies in the United States Mail, certified return receipt requested, postage prepaid, addressed to Messrs. Leroy Jeffers, Ross N. Sterling, Richard P. Keeton and Harry M. Reasoner, counsel for said respondents, of the law firm of Vinson, Elkins, Weems and Searls, First City National Bank Building, Houston, Texas, 77002.

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mail postage prepaid, addressed to John W. Barnum, Esquire, counsel for said respondents, of the law firm of Cravath, Swaine & Moore, 1 Chase Manhattan Plaza, New York, New York, 10005.

DATED: At Houston, Texas, January ____, 1967.

Ben H. Schleider, Jr.

Attorney for petitioner,
ROBERT H. MARTIN